CONFIDENTIAL.

NOTE (WITH APPENDICES) BY THE HON'BLE SIR REGINALD CRADDOCK, K.C.S.I., ON THE SEPARATION OF JUDICIAL AND EXECUTIVE FUNCTIONS.

CONTENTS.

CONFIDENTIAL.

A Note upon the separation of Judicial and Executive functions

INTRODUCTORY

If I preface this note by the statement that this was one of the great questions that Lord Curzon set himself to deal with and dispose of, but was in the end obliged to leave undisposed of after keeping it for three years because of its long history and the mass of conflicting opinions recorded, I shall be giving some idea to His Excellency and to my Hon'ble Colleagues of the difficult and troublesome nature of the case. Nevertheless when I have reviewed the issues, analysed the opinions, the grounds on which they are based and the authority which attaches to them, I have strong hope that at the last the points to be decided and a correct decision on them will emerge clear and simple, and that the recommendations that I shall have to make as to the line of policy to be followed will meet with the full support of my Hon'ble Colleagues

II Before proceeding to explain the history of the case, I will ask my Colleagues to carry with them throughout their study of it, as I shall present it to them, the following very important considerations :—

(*i*) That the controversy being now a very old one much that has been said or written in years gone by on this subject may have become obsolete by sheer process of time

(*ii*) That it is very important to dissociate the opinions which are clearly based on *á priori* reasoning on precedents from Europe or other countries from opinions which are based on an intimate knowledge of India

(*iii*) That if the demand made by the Congress or the Press were to be conceded, the only change made would be a change affecting the internal administration of criminal law in the districts and that the opinions of those who are best acquainted with the internal details of district administration are therefore entitled to the greatest weight

(*iv*) That the decision on this case is a very important one, as it is not in the category of small concessions likely to have no far-reaching effects, which can be granted or refused as a mere matter of policy On the contrary, it is a veritable Rubicon that we are asked to cross, the crossing of which involves radical alterations in the whole system of our administration of the country.

(*v*) That every one who examines the case must ask himself whether this demand is in the nature of a concession at all, and if it is, to whom it is a concession? Who will benefit by it? Who will stand to lose by it? Who asks for it, and whether those who ask for it have any correct appreciation of the results of granting their prayer?

III. I will divide my subject into the following chapters —

I.—The ancient history of the controversy

II.—The memorial of the *ex*-Chief Justices, Judges and others

III.—The action taken on the memorial.

IV —The results of the reference to local Governments and High Courts.

V.—The stage reached in Lord Curzon's time

VI —The revival of the question by Lord Minto's Government.

VII —The opinions of the two Bengals on Sir Harvey Adamson's scheme and the Government of India's despatch of 1910.

VIII —The present stage of the question.

IX.—The modern aspect of the case.

X.—Recommendations.

CHAPTER I

The Ancient History of the Controversy.

1. The ancient history is well told in Mr Quinton's note contained in the green compilation entitled "*A collection of notes on the subject of the union of judicial and police functions in the magistrates of British India outside the Presidency Towns.*" It seems unnecessary for me to attempt any detailed reproduction of the ancient history of the subject before the days of the Penal Code, the various Police Acts, and the Code of Criminal Procedure. But it is interesting to note that the system now recommended to us by some of those in favour of separation was actually in force at one time, namely, the system under which Civil Judges carried out magisterial work. It was held to have failed entirely in dealing with crime, and a separate magistracy with limited powers came into existence These powers were gradually increased until in 1829 the offices of Collector and District Magistrate were combined. Mr. Quinton's note presents to us how Magistrates were first merely officers with magisterial powers attached to the courts of Civil Judges, and how they gradually became separate from the Civil Judges until magisterial powers were finally concentrated in the Magistrate and Collector and his assistants.

Mr Quinton's note

2. The controversy began again in 1837 when a Committee was appointed the early history of which is told in pages 6 to 9 of Mr. Quinton's note The separation of the functions of magistrate and collector was carried out in 1845 but this was because it was thought that the collector of revenue could not be expected to look after the police This step was in accordance with the recommendations of the majority of the Committee of 1837 On this Committee sat Mr F. J Halliday, afterwards Sir Frederick Halliday, the first Lieutenant-Governor of Bengal, and he recorded a Note of Dissent from some of the conclusions in which he stated that the "functions of the Judicial and Executive could not properly be combined." The same expression is to be found in other opinions which Mr. Quinton has quoted in support of the separation. That this should be the case is not surprising There was no Superintendent of Police in those days and police darogahs on Rs 25 were the highest police officers available. Clearly therefore if the Magistrate had to command and direct the investigations of a police of this kind, it was difficult for him to be an impartial Magistrate. It is grossly unfair to quote any of these opinions as bearing upon the question to-day The real remedy for the state of things then in existence was not in separating the revenue and magisterial functions from one another, but in giving the police force separate, competent and responsible officers whom the Magistrate would guide and control but in whose pursuit of criminals he would take no part This was the remedy ultimately arrived at when the various Police Acts were passed, and the further steps that have since been taken to improve and purify police administration are matters of recent history.

The Bengal Committee of 1837

Mr (Sir) F Halliday's note of dissent in favour of separation.

3. The separation of the duties of Magistrate and Collector was not of very long duration. In 1854 Lord Dalhousie on making over charge of the Government of Bengal to the first Lieutenant-Governor, Sir Fredrick Halliday, recommended that the functions should again be united. His Lordship stated that "the defect of the separation was that there was in the Lower Provinces a class of officers, the Collectors, of mature standing, highly paid, and with very little work while there was another class, the Magistrates, inadequately paid with very heavy work without sufficient experience to enable them to do that work in such manner as fully to command the confidence of the community however zealous and active they might usually be." He therefore recommended that the two offices should be re-united as in the North-Western Provinces Sir J. Peter Grant recorded a Minute opposing the union on the old ground, *i e*, "the combination in one man of the functions of thieftaker and judge" and the same controversy ensued. But in 1856, or eighteen years after his early opinion

Lord Dalhousie's recommendations in 1854

in favour of separation, the Lieutenant-Governor of Bengal Sir Frederick Halliday recorded an expression of opinion in favour of the union It is amusing to notice that while the advocates of separation lay great emphasis on Mr Halliday's opinion as a young man, they pass over Sir Frederick Halliday's opinion expressed eighteen years later as of no value I attach in the appendix to this chapter parallel extracts from the notes of Sir Frederick Halliday, but the following passage is worthy of special quotation —

Sir F Halliday in 1856 in favour of re-union

"There is, however, an opinion which has found favour with some persons of just weight and authority in matters of this kind, and which has indeed a certain plausibility which tends to recommend it to many and especially to those whose experience or mode of thinking has been derived from the European rather than from Oriental habits, against which I am especially desirous of raising my testimony in this place—the rather, perhaps, that in the days of my smaller experience I myself have held and advocated the opinion, which I now very heartily condemn"

I also commend the attention of my Colleagues to the reproduction of paragraph 53 of Mr Quinton's compilation containing Sir Frederick Halliday's anticipations upon the friction that might arise from two independent authorities working in the same place Although a certain colouring of this passage relates to an earlier period of society which has passed away, yet in many essentials the description given of the antagonism that might arise between two such authorities is as true now as on the day on which it was written

The Court of Directors in their despatch no. 41, of the 24th September 1856, quoted at page 15 of Mr Quinton's note, in recommending the reorganization of the police throughout India while desiring to sever police and revenue work so far as subordinates were concerned, particularly excluded the Collectors from this separation So far as the dissociation of the police from revenue functions is concerned, it is a pity that these principles of the Court of Directors were not put into effect in Bengal where the undesirable utilisation of the police in miscellaneous matters outside their proper duty survives to this day. Lord Canning accepted the union, which was ultimately sanctioned by the Secretary of State in 1859 and has continued ever since

The Court of Directors' Despatch of 1856 on Police Reorganization

4 The account given above represents the history of the subject in Bengal proper Mr Quinton goes on to describe the system in all other parts of India It is not necessary to go into details here Suffice it to say that throughout India it was ultimately found that the best arrangement was to make the Collector the chief authority over the magistracy In Bengal, Bombay, Madras and in Northern India entirely independent authorities independently arrived at the same solution From that time to this day the arrangement has continued, but the great difference made has been that the connexion of the Magistrate with the police has taken the final form of general supervision The system of combination, namely, the utilisation of the Collector as Chief or District Magistrate, even in the days of much closer connexion of the Magistrates with the work of the police than now obtains, met with the approval of such Viceroys as Lords Cornwallis, Dalhousie, and Canning, and of great English lawyers like Sir James Fitz James Stephen, and of a Lieutenant-Governor like Sir Frederick Halliday whose riper experience of administration had made him a complete convert from the views that he had held as a young man , also of Mr Thomason of the North-Western Provinces, one of the greatest of Indian administrators, who was full of sympathy with the people, and whose instructions to revenue officers stand out as a classic, and have been the foundation of moderation in the assessment of revenue over the whole of Northern India Mr Thomason's minute of 1845 is quoted extensively at pages 17—19 of Mr Quinton's note, but the following passage, showing his conviction to be the same as those of Sir Frederick Halliday, might have been written at the present day ,

History of subject in other parts of India

Advocates of the system of combination

Mr Thomason's Minute of 1845

"But it is above all things necessary to avoid in this country the clashing of co-ordinate authorities Disputes arise upon mere trifles, and the passions of well intentioned men are inflamed by intriguing subordinates The public interests are often damaged by the controversies

of two intemperate but honest officers This is most likely to occur where both officers possess extensive powers and large establishments, and the necessity of avoiding it forms a strong argument for vesting the powers of Magistrate and Collector in one person, and also for giving the tahsildars police powers "

It was as an outcome of all this discussion that the Criminal Procedure Code and the various Police Acts were passed, which with mere modifications of detail have been preserved ever since

5 In his last chapter Mr Quinton analyses the opinions elicited in response to a series of questions which he had been instructed to put demi-officially to the various Governments and High Courts as to the merits of the system and the need for any change There was absolute unanimity in favour of the union on the part of the local Governments and experienced executive officers who had held high judicial office while the various High Courts had no objections to take The Madras High Court wrote as follows —

Views of local Governments and High Courts in 1884

" The power which the Magistrates possess under the Code the Court considers necessary and salutary When agencies are at work to baffle the investigation of the police, the influence of the Magistrate often elicits information which could not otherwise be procured In his presence witnesses whom the fear of influential neighbours restrains are emboldened to come forward Moreover the presence of the Magistrate, or his close supervision of the investigation, prevents misconduct on the part of the police "

The Madras High Court's view

The High Court of Allahabad agreed with this view and the Bombay High Court made no complaint. The Bengal Law Reports disclosed only four cases in 14 years in which magisterial functionss were abused Naturally the various authorities condemn, as all right-minded person would condemn, any undue influence by an over-zealous Magistrate in the course of a prosecution, but they all held that such instances were rare, that such rare instances of indiscretion were of little importance by the side of the risk of depriving the Magistrates entirely of any control, and of all feeling of any sense of responsibility to the Executive Government The Bengal Government quoted with approval the following remarks of their Inspector General of Police .—

Views of Bombay High Court

Views of Bengal Government.

" The Magistrate is the link between the police and the judicial which prevents criminals having it all their own way Very many of our judicial officers think that they owe no duty to society, and that their whole duty consists in acting as counsel for the prisoner Only a day or two ago a well-known native gentleman said to me that every native had a bias in favour of the prisoner and that the Magistrate acts as a corrector of this bias
The cry about the union of judicial and police functions being objectionable is, I am certain, got up by persons who know nothing of the subject The Magistrate who exercise judicial functions do not exercise police functions, and the administration of justice in the country at large would distinctly suffer were one man not at the head of both departments The power is one which ought to exist but (as it is) to be sparingly exercised "

Sir Charles Crosthwaite, Chief Commissioner of the Central Provinces, who had also judicial experience emphasised the need of control of the police He wrote —

Sir Charles Crosthwaite's views

" They (police) want a strong hand over them—the hand of a man who has no departmental feelings Our present District Superintendents are and must be departmental, and the boy Superintendents are not the most likely persons to check faults of this kind Any attempt to remove the control of the District Magistrate will, in my opinion, be a fatal mistake If it is thought that, having control of the police, he ought not to try cases, then you must strengthen the subordinate staff so that he may be relieved of all measure of criminal judicial work. It will be so much the worse for the innocent people who happen to be accused "

Mr. Melville, a Member of the Bombay Council and formerly a Judge of the High Court, wrote as follows .—

Mr Melville's views

" The complaint, I suppose, is that they (Magistrates) identify themselves with the prosecution, as they are naturally liable to do if they have been collecting evidence, and that being eager to obtain a conviction, they are disqualified from forming a judicial opinion on the evidence I think that I may safely say that the system in this Presidency does not conduce to any such result And again I have never heard any complaint made, nor have I known any difficulties occasioned by the union of executive and magisterial functions, nor have the High Court ever made any unfavourable comments on the system It may be that a revenue

officer when acting as a Magistrate is liable to be prejudiced in regard to charges arising out of matters in which he is interested in his revenue capacity, but those are of rare occurrence and of a trifling character"

Mr Quinton's suggestions

6 Mr Quinton concluded his note by a few suggestions as to executive instructions to district officers to prevent even those few cases of misdirected zeal which might occur This note, which Mr Quinton had prepared at the instance of Lord Ripon, was placed before the latter on the eve of his handing over charge of his office as Viceroy From the brief Minute that he recorded it can be said to be certain that he had no time for a proper study of the case For example, he failed entirely to grasp that the whole essence of the controversy was not based on the number of cases that the District Magistrate tried himself but on the control over the Magistracy that he exercised Lord Ripon expressed his strong preference for a complete separation as being the most theoretically perfect system Turning to the practical side of the case he proceeded to comment on a case known as the Nuddea case Some students had been prosecuted for creating a disturbance at a fair The District Magistrate and the District Superintendent of Police had been prominent in ordering the prosecution and had given evidence of the facts that had come to their notice But the whole case turns upon the point that in spite of their so-called pressure upon a young Assistant Magistrate of 21 months' service that Magistrate acquitted the accused It is difficult to say, therefore, how the case supports Lord Ripon's arguments For even if the suggested change was brought about, the District Officer would still be left with control over the police, and this Nuddea case, which was after all a trumpery one, would have gone on exactly as it did Lord Ripon quite failed to see that the whole point of the case from his point of view was spoilt by the fact that the young Assistant Magistrate acquitted the accused and he could not surely contend that the District Magistrate and the District Superintendent of Police were not entitled to prosecute persons at a fair who might appear to them to have broken the law As this part of the case could not be found fault with, Lord Ripon went on to discuss what would have happened if the accused had been convicted and how the appeal would have lain before the Magistrate who ordered the prosecution. The District Magistrate in question positively stated that he would not have heard the appeal himself and it is scarcely justifiable for Lord Ripon to have based his remarks on a theory that had the Magistrate convicted, the District Magistrate would actually have heard that appeal In fact the citing of a solitary example, which if it proved anything, proved the independence and not the subservience of the Magistrate, shows how very superficially Lord Ripon had been able to go into the matter The Home Member, Mr Gibbs, himself wrote in his note that Lord Ripon had informed him that he had merely thrown out these ideas and that he had not been able to examine the matter deeply and it is obvious that he set out to put what he thought to be the theoretical grounds in favour of separation and tried to catch hold of any example which came first to his knowledge to prove their practical application. It was unfortunate from his point of view that the case which he should have selected actually proved the contrary Sir Alexander Mackenzie, Mr. Gibbs, Sir Dennis Fitzpatrick and Sir Steuart Bayley all noted in favour of or acquiesced in the dropping of the question raised by Lord Ripon and in the circumstances Lord Dufferin agreed to the matter being dropped These notes, are reproduced as an appendix to this chapter and will repay perusal

Lord Ripon's Minute in favour of separation

The Nuddea Case

Opinion of Sir A Mackenzie and others

Further examination of the question dropped by Lord Dufferin

7 I conclude this chapter by remarking that all the best and highest authorities in pre-mutiny days had come to the conclusion that the union of the functions of Collector and District Magistrate was best calculated to secure the efficient administration of criminal law and the maintenance of peace and order, and that 27 years later the most eminent authorities, with all the added experience of the intervening period at their disposal, came to the

Weight of opinion opposed to separation both in 1856 and 1884

same conclusion It so happens that further period that has elapsed since the decision of Lord Dufferin's Government has also been 28 years which exactly coincides with the period of my service in India, and, as I shall hope to demonstrate, in spite of the development of the country during that time, the dangers of separation for which the Bengali Press is agitating have become greater and not less with the efflux of time

CHAPTER II

The Memorial of the Ex-Chief Justices, Judges and others

8 For several years after 1884 the controversy lay dormant * In 1899 the Secretary of State, Lord George Hamilton, forwarded to the Government of India a communication from Sir William Wedderburn and Mr Herbert Roberts covering a memorial which consisted of materials collected by Mr Man Mohan Ghose of the Calcutta bar, and signed by a number of ex-Judges

The Wedderburn Roberts Memorial forwarded by Lord George Hamilton in 1899

Before I deal with this memorial I would like to draw attention to the following considerations —

(*i*) That when the individual signatories gave their individual opinions they were far less sweeping, far more moderate, and far less positive than the opinions expressed in the memorial itself

(*ii*) That only two of the signatories had any experience of any district administration, Sir William Wedderburn and Mr Herbert Reynolds Both of these gentlemen were partizans of the Congress, and although honourable men, were yet totally impracticable persons

(*iii*) That the memorial was the work of Mr Man Mohan Ghose and that it was not honestly framed,—a fact of which the many eminent men who signed it were of course totally unaware

This last fact cannot but detract from the weight which would otherwise attach to the opinions of the memorialists

9 The exordium of this memorial is in the following terms —

"The present system under which the Executive Officer of a district collects revenue, controls the police, institutes prosecutions, and at the same time exercises large judicial powers, has been and still is condemned not only by the general voice of public opinion in India, but also by Anglo-Indian officers and by high legal authorities"

Mr Man Mohan Ghose and his followers in the Congress no doubt condemned the system, but outside the coterie of Bengal lawyers the cry for separation is merely an echo, one of the omnibus requests which adherents of the Congress annually subscribe to without discussion, along with other requests like permanent settlement, repeal of the Arms Act, universal trial by jury, and several other nostrums, which are mere aspirations after Utopia, and which those who subscribe to them know full well to be absolutely unsuitable to the circumstances of the country

Unfair historical retrospect

10 This memorial is divided into three parts —(*a*) an historical retrospect; (*b*) the existing grievance and the remedy, (*c*) answers to possible objections

Anything more one-sided and disingenuous than the historical retrospect it would be hard to imagine

The first quotation is one from a Bengal Regulation of 1793 This had nothing to do with executive and judicial, but deprived the Collector of revenue jurisdiction in the areas permanently settled It was all part of the fatal policy of the permanent settlement which left the ryot entirely at the mercy of the Zamindar No more fatal policy was ever inaugurated, and though many years afterwards action was taken by Bengal Legislation and otherwise to correct part of that blunder, yet the fatal effects of it remain to this day in the large dissociation of Collectors from revenue administration in Bengal Fortunately for the country this terrible blunder was never perpetuated in other parts of India

* The late Mr Romesh Chunder Dutt did submit, a scheme in 1893, but I do not wish to burden this note with a discussion of it because it was rejected when proposals for some form of separation were examined in 1908-1910

11 The memorial next proceeded to discuss the early controversy which I have described in the first chapter of this Note The great essential fact that the opinions related to the time when the Collector and Magistrate had also to discharge the functions of a Superintendent of Police is entirely ignored Mr Halliday's early opinion of 1838 is quoted *in extenso*, but Sir Frederick Halliday's complete recantation made as Lieutenant-Governor 18 years after, in 1856, is passed over with the following mention —

References to earlier controversies

"It is true that Mr Halliday 18 years later held a different view, and thought that the British Administration should conform to the oriental idea of uniting all powers into one centre But his personal change of opinion does not affect the force of his former argument"

The memorialists were evidently afraid to quote the opinion, lest his readers should find that they preferred the maturer to the cruder views But a still more glaring *suppressio veri* occurs in paragraph 6 of the memorial, in which an extract from the despatch, of the Court of Directors of 1856 is quoted in support of their view The despatch, says the memorial—

"Pointed out that to remedy the evils of the present system, the first step to be taken is, whenever the union at present exists, to separate the police from the administration of the land revenue * * * In the second place the management of the police of each district should be taken out of the hands of the Magistrate"

The paragraphs of the Despatch from which the foregoing extracts are taken actually run as follows —

"12 To remedy the evils of the existing system, the first step to be taken is, wherever the union at present exists, to separate the police from the administration of the land revenue *No native officer should be trusted with double functions in this respect We do not see the same objection to the combination of magisterial and fiscal functions in the hands of our European officers, because we can better hope they will not abuse their powers and because by employing the Collector as the principal Magistrate of each district, we are able to obtain for the chief administration of the penal laws a more efficient and especially a more experienced class of officers than would otherwise be available* This is an important consideration which ought never to be lost sight of nevertheless, it is still more important that the officers who control the police should be required to undertake frequent tours of their districts, and they must not be so burdened with other duties, such as the preparation of forms, returns and statements, as to be deprived of the time sufficient for this essential purpose This supervision, exercised by intelligent officers, who are accessible at all times, is the most certain and effectual check to every abuse of authority by subordinate servants of police

"13 In the second place, the management of the police of each district should be taken out of the hands of the Magistrate who would thus have more time for the exercise of the double functions adverted to in the foregoing paragraph, and be committed to a European officer with no other duties and responsible to General Superintendent of Police for the whole Presidency"

Can anything be more dishonest than the omission of the words in italics, and of the conclusion of the second paragraph?

12 The next quotation deals with Sir John Peter Grant's dissenting Minute but ignores the Minutes of Lord Canning and his colleagues It is quite obvious, when Sir John Peter Grant's Minute is perused, that he was contemplating the state of things in which the Magistrate was performing the duties of a Superintendent of Police No one is likely to dissent from his general principles; but he gave a very fine testimonial to the District Magistrates of that time when he writes as follows —

Sir J P Grant's Minute quoted

His tribute to the District Magistrate therein

"The judicial ermine is in my judgment out of place in the bye-ways of the detective policemen in any country, and these bye-ways in India are unusually dirty Indeed so strongly does this feeling operate, perhaps unconsciously upon the English minds of the honourable body of men, from whom our Magistrates are chosen, that in practice the real evil of the combination is not that a judge whose mind has been put out of balance by his antecedents in relation to the prisoner tries that prisoner, but that the Superintendent of Police, whose nerve and honesty are indispensable to the keeping of the native police officers in order, abandons all real concern with the detection of the crime and the prosecution of criminals, in the mass of cases, and leaves this important and delicate duty almost wholly, in fact, to the Native Daroghas"

13 The remainder of this portion of the memorial refers to the outcome of the first Police Commission which ended in the Police Acts It is true that Sir Bartle Frere in connection with the Police Bill indicated his personal hope in favour of some future measure of separation of police and magisterial duties; but the memorial entirely ignores all the discussions that look place in connection with this subject, and also in connection with the Code of Criminal Procedure, as well as Sir James Fitz-James Stephen's opinion as to the absolute necessity of maintaining the criminal jurisdiction of the district officer, and yet this was the opinion of a great English criminal lawyer I do not quarrel with the memorialists for not quoting opinions adverse to his case; what I do quarrel with him in respect of his retrospect is the suppression of the context and the *suggestio falsi* that Anglo-Indian officers and judicial authorities were as a body in favour of separation

Sir Bartle Frere's opinion in 1860.

14 The second portion of this memorial describes (paragraph 11) the duties of the Collector or Deputy Commissioner, and (paragraph 12) the grounds for separation; in paragraph 13 it refers to the cases summarised in the appendix which are intended to indicate the evils of the present system It winds up with a quotation from a Congress resolution which affords a most excellent example of the ludicrous lengths of exaggeration to which that wholly irresponsible body is so fond of committing itself:—

Contents of the second part of the memorial

Congress resolution quoted

"That this Congress having now for many successive years appealed to the Government of India to remove one of the greatest stigmas on British rule in India, one fraught with incalculable oppression to all classes of the community throughout the country, now hopeless of any other redress, humbly entreats the Secretary of State, etc, etc"

Contrast this with the interview printed in the journal "India" of Mr Man Mohan Ghose himself Mr. Ghose replied to the interviewer in regard to the general question as to administration of justice in India that he believed that:—

Interview with Mr Man Mohan Ghose in "India"

"Justice was never better administered, and that life and property were never more secure in the history of India than they are at the present moment Even the masses of the people in Bengal with whom I come daily in contact have learnt to appreciate the blessing of a pure administration of justice, and I believe further that the loyalty and contentment of the people of Bengal are mainly due to this appreciation on their part"

Then he went on to fill up his interview with many insinuations regarding the improper exercise of executive influence over the magistracy and the judges We find the following assertions.—

"As regards the judges and magistrates in the interior, attempts have been made in various ways in recent years to put pressure upon them to make their decision accord with the views entertained by the executive."

On being asked as to the method employed, he made the following statement:—

"In the olden days the executive officers were in the habit of loyally accepting the decision of judicial tribunals, but within the last 20 years (he was speaking in 1895) there has been a manifest tendency to put pressure upon our judicial tribunals to decide cases in accordance with the wishes of the Executive Judges and Magistrates have to look to the Executive for promotion and preferment, and if their decisions are subject to criticism by the Executive, such as the Magistrate of the district, the Commissioner of the division, or an Under-Secretary to a Government, it must impair the feeling of independence which every judicial officer already possesses"

He then proceeded to give instances of demi-official "chits" being sent by a District Magistrate to subordinate Magistrates and of pressure upon Judges:—

"A Judge whose verdict or whose decision does not meet with the approval of a District Magistrate is promptly reported against to the Government, it may be through the Commissioner of the Division, and the Government has the power of transferring him to an unhealthy station"

When asked to give instances, he said he could not; but that he suspected it in one case He then proceeded to talk about recent attempts to influence higher tribunals The fact is Mr Ghose entirely overreached himself by not confining his case to Magistrates, he assailed even the independence of the judges and went so far as to insinuate pressure even upon the High Court itself.

15 Having unbosomed himself of these *ex-parte* statements Mr Ghose next proceeded to send an account of this interview to the various ex-Chief Justices, etc, who then recorded their opinions on the advantages of a complete severance Their remarks are largely based on the assumption that Mr Man Mohan Ghose's statements are correct All the remarks are of much milder character than the statements in the memorial except the statement of Sir Richard Garth His letter to "India" contains expressions such as these:—

Views of ex-Chief Justices and ex Judges on Mr. Man Mohan Ghose's statement

Sir Richard Garth's opinion in 1895

"The unseemly conflict which is still going on in India between the judicial and executive services"

He pays a tribute to Mr Man Mohan Ghose's knowledge of the "evils of the present system, the grievous injustice to which it is constantly giving rise, and the utter fallacy of the excuses which are made by the Government for not rectifying this shameful abuse"

Then occurs the following paragraph:—

"The real truth is, as Mr Man Mohan Ghose tells us, and as Sir Charles Elliott and some other high officials in India are honest enough openly to avow, that the Government of India *approves* this scandalous system and whatever the Secretary of State may say, he would be very sorry to see it altered In point of fact if the Government had its will, the independence of the judges would be still further controlled and the High Courts themselves made subservient to the will of the "Executive"

These are hardly the words of judicial calm to be expected of an ex-Chief Justice

Sir Richard Couch, another ex-Chief Justice, makes the following remarks, affirming the necessity for separation on abstract principles He says:—

Sir Richard Couch's remarks

"The facts stated by Mr Man Mohan Ghose have mostly occurred during the last 20 years when I had ceased to hold any judicial office in India, and I cannot from my own knowledge give any opinion upon the action of executive officers during that time" Mr Man Mohan Ghose says —"In the olden days the Executive were in the habit of loyally accepting the decisions of judicial tribunals" This according to my recollection agrees with my experience of India But Mr Ghose continues, "within the last 20 years, there has been a manifest tendency to put pressure upon judicial tribunals to decide cases according to the wishes of the Executive" As regards these I am unable to believe with Sir Richard Garth "that the Government of India approve it, and would be sorry to see it altered"

The only authority outside Bengal that Mr Man Mohan Ghose is able to find to support him is Sir Raymond West, who was a celebrated Bombay Judge All Sir Raymond West can say is that if we were to sever the functions completely, we should remove many temptations to abuse, which may not always be overcome, and many grounds for suspicion and misrepresentation He pays a tribute to the sense of justice of Government and its officers, but he adds that they fail to appreciate "the underlying moral weakness of the system and its incapacity to command complete respect and confidence" Doubtless in his retirement Sir Raymond West was tempted to lay more stress upon the theoretical arguments in favour of the separation, and less upon the practical difficulties than he had when as Judicial Commissioner of Sindh he wrote strongly in favour of the existing system. Sir Raymond West did not sign the memorial

Sir Raymond West's opinion

16. No doubt most of the signatories to the memorial were honest men, and most of them eminent lawyers; but they had no intimate experience of India and no recent experience at all They all wrote on the assumption that Mr. Ghose's *ex-parte* statements were true, but they took no steps to verify the correctness of his case. Calcutta experience was (with one exception) the only experience they could claim. One naturally wonders why they could not find some other and more reputable journal than "India" to which to contribute their opinions, a journal which thrives on the views of men like Sir Henry Cotton and Mr C J O'Donnell, and which during the period of unrest often did its very best to excite bad feeling against the Government Among the most interesting papers of the series included in the appendices to this memorial are

Disabilities attaching to these opinions.

the article by Sir Charles Elliott in the "Asiatic Quarterly" in October 1896 criticising Mr Ghose's article with the question—begging title of "The necessity of maintaining the independence of the Judiciary in India" which had appeared in the January number, and the articles by Mr Field in the same journal, and by Mr. Reynolds and Sir John Phear in "India" replying to Sir Charles Elliott I think that Sir Charles Elliott adopted too uncompromising an attitude, and there were some weak points in his arguments; but his opponent carefully refrained from answering some of his really strong arguments especially those which reflected on the want of ingenuousness displayed by Mr Man Mohan Ghose

Sir Charles Elliott in October 1896 on Mr Man Mohan Ghose and the replies of Mr Reynolds and Sir John Phear thereto

17. The 20 cases discussed in the Calcutta memorandum as triumphantly vindicating the case for separation are really 18 cases only (for two, Nos 7 and 13, appear to have been eliminated by the memorialists), and they have been criticised on the following grounds.—

Specific cases justifying separation analysed by by Sir C Elliott and others.

(i) They are rare cases—the best that a Calcutta criminal lawyer could rake up over a period extending over 20 years, and his assertion that they were merely typical of many was pure assertion

(ii) They are not extracts of judgment given in the courts, nor even extracts from the press; but they are the *ex-parte* descriptions given in Mr Man Mohan Ghose's language and the complexion given to them is that of the advocate and is often most misleading.

(iii) The great majority of them are totally irrelevant to the issue, for they are instances of executive indiscretion and have no bearing on judicial functions

These cases have been analysed in detail by various officers, among whom were included Sir Charles Elliott, Sir John Hewett, Sir Denzil Ibbetson, and others. In case they may seem to be prejudiced, I should prefer to draw attention to the note of Sir Thomas Raleigh, who could not under any circumstances be regarded as a prejudiced man He made a separate note on such of the cases as could be found in the Calcutta Law Reports, and he says:—

Sir T. Raleigh's note

"I do not propose to comment in detail on the cases sent up from Provinces other than Bengal, because I agree generally with what the Hon'ble Mr Hewett has written in his Secretarial note Two observations may be made on the papers now before Government

In the first place, assuming that cases of abuse have been brought to light, no attempt has been made to determine what proportion these cases bear to the total volume of judicial work No system is perfect I could from my own experience furnish a few cases in which English Judges or Magistrates have shown undue eagerness to convict, but I do not present these occasional failures as samples of English Justice"

Sir Thomas Raleigh goes on to point out how no attempt has been made to determine what proportion the cases of abuse bear to the total volume of judicial work; and no attempt is made to compare the working of our present system with the probable working of the system for separation.

He says:—

"In the second place, no attempt is made to compare the working of our present system with the probable working of a system of complete separation Deprive the District Magistrate of his judicial powers, and he will still be the head of the district, a person to whom Deputy Magistrates and others will readily defer I have been going through some of the cases which came before the Government of India during my time in Council—the Chapra case, the Jherria Colliery case, etc,—and I cannot find one in which the head of a district was charged with abuse of his *judicial* authority The real danger lies in the indiscreet or over-zealous use of *executive* powers, and this can only be prevented by good training and firm discipline"

18 To sum up this portion of the Note. In the famous memorial we have an attempt on the part of the Congress, inspired by an astute Calcutta lawyer, who furnished the materials to attack the existing system The Congress organ India is used for the purpose, and a number of ex-Chief Justices and English lawyers are a Company of Marionetts who go through the form of signing a documemt teeming with disingenuous suppressions of truth and suggestions of falsehood With

True view to be taken of the memorial

one exception these eminent personages when separately interviewed have repaired in their individual capacity from committing themselves to opinions which collectively they were afterwards induced to endorse, the one exception being Sir Richard Garth who only betrays his own want of sense of justice by a vituperative attack on the good faith and honesty of the Government of India who are said deliberately to desire that judicial decisions shall conform to executive wishes It is evident that the decision of this most important question cannot rest upon the exaggerated and disingenuous statements of the memorial and the pious opinions of the lawyers who signed it, men who with one exception had no experience outside the Presidency towns, men who regarded the Congress organ "India" as a most suitable recipient of their views

The famous 18 or 20 cases quoted, if they proved anything proved that the High Courts and local Governments were ever ready to rebuke and punish any improper use of authority Had it been true that cases of indiscreet and misguided zeal or spiteful prosecution were the rule instead of the rarest exceptions, how could we find such a one as Mr Ghose himself showering the warm eulogy that he did upon the purity of British justice ?

It may be thought that in demolishing the memorial I am flogging a dead horse, for the Government of India has never accepted the memorial; but whether they accepted it or not Sir H Adamson acted upon it as if it were true, and rejected all the evidence upon which its demolition rested, as the later chapters of these notes will make manifest.

CHAPTER III.

THE ACTION TAKEN ON THE MEMORIAL

19 The Secretary of State's despatch forwarding the memorial was noted on by the late Mr Luson Sir Andrew Fraser endorsed this admirable note, and a despatch to the Secretary of State repudiating the arguments contained in the memorial and rejecting its conclusions, was drafted under the orders of Sir Charles Rivaz Lord Curzon however recorded his opinion on the 31st January 1900 that a summary and contemptuous rejection of the memorial, having regard to the status of the signatories, would be a serious error of policy He gave his reasons for considering it better first to ascertain the views of the High Courts and Local Governments before replying to the Secretary of State While he was not at all prepared to accept the statement in the memorial as being in any way sound or conclusive, he thought that it might be possible to do something in the direction of greater separation; but he did not think it wise to adopt a 'non possumus' attitude until the Government were in possession of the opinions of these authorities Lord Curzon's proposal met with the concurrence of the Council, and some valuable opinions were recorded Sir Denzil Ibbetson wrote —

Proposal to reject the memorial summarily

Lord Curzon's view

> "Holding, as I do, that after the defence of the country from external aggression and of its people from internal disturbance, the administration of criminal justice is perhaps the most important function which we have to perform in India, and holding further, as I do strongly, that under existing conditions, it is absolutely impossible to secure its effective administration unless its supervision rests in the main with those officers who are responsible for the peace and order of their districts, I think we should take advantage of the present opportunity to examine the matter fully and deliberately, and to state our opinion (whatever it may be) in a form, and support it in a manner, which may set the question at rest, at any rate for a time And we certainly cannot do this without obtaining the advice and opinions of the local Governments, who have a more immediate concern with and a closer and greater experience of the practical aspect of the question than the Supreme Government can possibly have I think, moreover, that it is important to remove our decision (if we adhere to the view which has hitherto been held) from the narrow basis of financial impracticability upon which it has been based by two different Secretaries of State, and to place it upon the broader basis of administrative inexpediency So long as it rests upon the former, we shall periodically be called upon to examine suggestions (such as Mr Dutt's scheme) for overcoming the difficulty, and shall always be liable to pressure on the round that our financial position has or might be improved"

Sir Denzil Ibbetson's view

Sir Arthur Trevor recorded —

Sir Arthur Trevor's views

> "It is hardly probable that the replies from the Local Governments will be received in time for the question to be considered before I leave India , and I venture under these circumstances to take the present opportunity of placing on record as shortly as possible the opinions which, subject to any evidence to the contrary which the present enquiry may elicit, my experience has led me to form on the subject
>
> It is necessary, of course, that our administrative arrangements should be so adjusted as to secure that cases in which Government or its officers are interested should be dealt with by tribunals whose independence and impartiality are beyond question, and there can be, of course, no objection to such a distribution of duties among various classes of the administrative body as may be conducive to the prompt and efficient despatch of business But any separation which goes beyond this and tends to divide the judicial and executive branches of the service into two rival, if not hostile, camps, between which there is a great gulf fixed—and to turn the judicial branch into a body out of touch and sympathy with the general administration prone to regard themselves as the protectors of the people against the oppression of the executive—and above all criticism, censure, or control except that of an hierarchy of their own body, can in India do little good, whereas it may indirectly do an enormous amount of mischief The demand for separation owes such weight as it possesses to the respect due to the traditions of English law and practice But it must not be forgotten that those traditions have a political rather than a judicial origin They go back to the days of the struggle between liberty and prerogative—to a time when, owing to the power of the Crown and of the aristocracy, the need for asserting and fostering the independence of the judiciary as a protection to the innocent against unscrupulous abuse of authority and influence was a consideration more present to the founders of the system than the importance of securing the

punishment of the guilty The latter was a side of the question which they doubtless felt might well be left to take care of itself In England it *does* take care of itself, thanks mainly to the robust common sense of all concerned acting as a corrective of legal theory In India, the conditions are different There is neither traditional nor practical justification for the subordination of practical considerations to theories which had their origin in a state of society which has no counterpart in our administration Here, except where Government has its own rights to maintain, a case, for which, as above noted, special provision must be and is made, Government and its executive, not less than the judiciary, are on the side of the oppressed and innocent I will not go so far as to say that the whole of the establishments we are forced to employ, more particularly in the Police, and the Native Magisterial and Judicial branches are absolutely immaculate But allowance being made for the occasional cases of wrongheadedness which must be expected under any system, however perfect, it is emphatically true of the higher European agency, and the remedy for such shortcomings as there are, does not lie in confining the hearing of cases, civil or criminal, to one set of officers who are to do nothing else For nine-tenths of the judicial work to be done in India, a man who to a fair amount of commonsense adds a good working knowledge of the Indian Codes and the widest possible knowledge of the customs, character and habits of thought of the people with whom he has to deal, including the police of the district, is better qualified than the most highly trained lawyer taught to have no eyes or ears for anything but the evidence which the parties choose to tender, and the legal arguments of Counsel who are more concerned to win the case each for his own side than that justice shall be done There is no country in the world where, owing to the habits of the people and, I will not say, their want of veracity, for I believe them to be truthful enough in their private and domestic business relations amongst themselves, but to their apparent inability to regard our tribunals as by law established as entitled to be told the truth and the inferiority of much of the agency we are compelled to employ, the attainment of justice is beset with greater difficulties There is no country where it is more important that, if justice is to be done at all, it should be done promptly and as far as possible at first hand, every additional stage between the first report of a case and its final hearing increases the difficulty, and yet we have been forced of late to listen to proposals to amend the law with the object of restraining Magistrates from dealing with offences they have themselves seen committed The best results are to be looked for where the Executive and Judicial authorities are in sympathetic and cordial co-operation, and the more absolute the differentiation of their functions, the more difficult it becomes to avoid antagonism I will only add that I am in entire accord with what has been said in the notes as to the mischief which may result to the administration from such injury to the prestige of the District Officers as the loss of their magisterial jurisdiction would entail "

Sir Thomas Raleigh's remarks are interesting in the light of a later note which forms an appendix to Chapter V, but to which I will refer in the last chapter Some of the rough suggestions that he threw out he afterwards abandoned, but the following remarks of his are of some interest —

Sir Thomas Raleigh's first note

"The distinction between judicial and executive authority is, to my mind, of the essence of good government, whether in England or in India But we may distinguish the two kinds of power without entrusting them to two strictly separated official bodies It is sometimes expedient that both powers should be exercised by one man To take a familar example, the Lord Chancellor in England is both Judge and Minister For many reasons I should be sorry to see the duties of that great office divided between a Minister of Justice and a Chief Judge of Appeal

I am not at all disposed to withdraw the judicial powers of District Officers in deference to any abstract theory On the other hand, I am not impressed with the abstract argument for retaining these powers, as presented in Sir Charles Elliott's article It seems to me that we ought gradually to make a further separation between executive and judicial work, not aiming at logical completeness but doing the best we can for each district, with the men and money we have I venture to indicate, very roughly and quite provisionally, the lines on which it may be found possible to proceed —

"1 Criminal appeals may be transferred from the District Magistrate to the District Judge This would, I think, be an additional security for justice

District Magistrate to be relieved of appellate work

2 The original criminal jurisdiction of the District Magistrate may be left as at present, on the understanding that he exercises it only in cases which he thinks it expedient to transfer to himself, and perhaps in cases of small importance, such as he may deal with on tour No case of any importance should be dealt with unless in the regular way, at a set time and place, with the usual safeguards for the protection of the accused

Original criminal jurisdiction unimpaired

3 The District Magistrate's control over subordinate criminal courts may remain, but he should be clearly instructed as to the limits within which his control is to be exercised He may assign or transfer cases to one court or another, he may advise a Deputy Magistrate on points of law, he may deal with a Deputy

Relation of District Magistrate to subordinate criminal courts outlined

who has erred through ignorance, or weakness, or dishonesty But he should never take the case out of the hands of the persons who tries it by indicating, directly or indirectly, what the judgment is to be Only the Judge who hears the evidence can decide the case"

As to the first two suggestions Sir Thomas Raleigh, of course, spoke without full acquaintance with India, but his third suggestion appears to me to be a most admirable one as defining the true functions of the District Magistrate in connection with Subordinate Mag strates I shall refer to it later in the last chapter of this note But it is very important as indicating the fresh views of an English lawyer, who certainly was not prejudiced in favour of the existing system, as to the manner in which the functions of a District Officer, as the Chief Magistrate of a district, can be exercised without prejudice to the cause of justice

Sir Denzil Ibbetson's summary

Sir Denzil Ibbetson, in summing up the opinions of the Council, concluded his remarks as follows —

"Finally, as I also shall not take part in the discussion of the general question, I may perhaps, be allowed to say that I agree in every word of the opinion upon it which the Honourable Sir A Trevor has placed on record, and that in a note which I began to write, before I came to the conclusion that any discussion by me of the general question would be premature, I started from the very argument which has impressed the Honourable Mr Dawkins I agree with the Honourable Mr Raleigh that the distinction between judicial and executive authority is of the essence of good government in India, as in England, and I believe that one of the most valuable political lessons which we have taught the people of this country, and the one which has startled and impressed them most, as being foreign to their previous experience, is our subordination of the executive Government to the law It has done more than any other single factor, I believe, to inspire them with confidence in, and respect for, our rule But the most scrupulous regard for this principle is in no way incompatible with the retention of control over the administration of criminal justice in the hands of the executive head of the district, a retention which I believe to be absolutely essential to the efficiency of both branches"

The memorial circulated to Local Governments and High Courts

20 In accordance with the decision of the Council, the memorial and its appendices were circulated to local Governments and the High Courts with a letter dated 31st March 1900, together with the note by the late Mr Quinton In this letter the glaring instance of unfairness in the memorial was pointed out in paragraph 11 *supra*, but the letter gave no other clue or guidance as to the lines which the Government of India thought should be taken

Terms of reference

The reference was in the following terms —

"*Firstly*, how far the combination of executive and judicial functions in the same hands actually leads to abuse, whether there is any practical evil to be remedied, and if so, of what nature and degree

Secondly, whether there are any, and if so, what considerations on the other side which must be set off against such abuses as may have occurred and which tell in favour of retaining the present system and on which side the balance of advantage lies His Excellency in Council thinks that these questions should be considered with reference to conditions as they exist in India rather than to any abstract principles or to the practice in other parts of the world And he desires that the matter should be examined on the broad ground of general administrative expediency, as well as on the narrower basis of immediate practicability financial or otherwise In many Provinces separation has already been carried to a considerable extent, especially in the higher grades, in some the change is sufficiently recent to allow of an estimate being formed of its results, and it may be that some further advance on the same lines is possible and expedient if complete separation is not"

A definite statement was asked for as to cases of abuse which had come before the local Government or High Court during the last five years, in which definite miscarriage of justice could be specified

CHAPTER IV

THE RESULTS OF THE REFERENCE TO LOCAL GOVERNMENTS AND HIGH COURTS

Examination of the replies to the reference

21 This is one of the most important chapters of this Note, because the replies to this reference present the deliberate and mature opinions on both sides of a number of highly responsible men actuated by the highest ideals And yet one cannot resist the conclusion that when Sir Harvey Adamson persuaded Lord Minto and his colleagues as to the action that they would take, they threw away the whole of this valuable material, and based their decision not upon the evidence in the case, but upon the mere *á priori* ground that separation was *prima facie* desirable, and that the fairness of the Criminal Courts, even if it could not be impugned, was nevertheless under suspicion These opinions make up a bulky volume of over 800 pages, but I have selected a few on both sides and included them in the appendices to this chapter, and I shall quote from various others

Sir Henry Cotton's Minute

22 The first letter in the series is the Minute by Sir Henry Cotton, the only executive officer of any status, who advocated *complete* separation Sir Henry Cotton follows the usual practice in such cases of telling us of the numerous cases of abuses which he could cite if he liked, but which he does not wish to cite The value of judicial independence, he tells us, is recognised by all intelligent people in India Nobody denies this, but if the system really teemed with the abuses which Sir Henry Cotton would have us believe, it is quite impossible that the value of judicial independence existing under the present system could have ever become so widely appreciated (*vide* Sir Denzil Ibbetson's remarks quoted in the last chapter) Even Sir Henry Cotton suggested very tentative steps in local areas As the practical method of bringing in the separation, he advocated that the Indian Civil Service should be recruited solely for executive work, and that the Magistracy, like the Civil Judiciary, should be appointed by the High Court, the selection being made from among advocates and pleaders and other members of the legal profession He thought that Civil Judges might combine criminal work with civil

Sir Henry Cotton may be an honest man, but if he is honest his views on other subjects do not inspire one with much confidence that his views on this subject are correct

(1) Sir Antony MacDonnell's view

23 *United Provinces*—The next opinion in the compilation is that of the Lieutenant-Governor of the United Provinces, Sir Antony (now Lord) Macdonnell; it is worthy of the utmost attention There was no administrator in India who was so stern to punish any improper action by a subordinate officer, however highly placed, and no one could possibly accuse him of any want of sympathy with the highest justice I quote the following passages from his letter (paragraph 7) —

"It is the opinion of the Lieutenant-Governor and Chief Commissioner that actual experience in these Provinces does not show that there is any practical evil calling for remedy in connection with the part of the administrative system referred to by the memorialists The most that can be said is that in a few cases District Magistrates have injudiciously or improperly attempted to influence, or have conveyed their opinion as to the merits of a case to, an officer engaged in trying it But the resentment felt not only by European but by native Magistrates, when such opinion was brought to bear on, or advice tendered to, them, is in itself sufficient to show that the cases were of the nature of exceptions to the general rule As a matter of fact, both District Magistrates and their subordinates are sensitively opposed to anything having the appearance of interference with the independence of the judiciary in cases which actually come before the courts The only really bad case of abuse of judicial power which has been brought to the notice of the Lieutenant-Governor during the last five years is one in which a Tahsildar in his judicial capacity misused his power to conceal the misdoings of his executive subordinates But even if the proposed separation were carried out to its fullest extent, misconduct of a similar character might be committed by any unjust judge"

This resentment of interference to which the Lieutenant-Governor referred fully agrees with my experience of 27 years in the Central Provinces

In paragraph 11 of the same letter, the Lieutenant-Governor writes :—

"Coming now to the second part of the question under consideration, I am to point out that there are powerful reasons of practical expediency for the maintenance of the present system on its broad lines The chief of these reasons is connected with the control of the police It cannot be doubted that the existence in the hands of the District Officer of the chief magisterial power enables him to exercise great control and authority over the police Take away from the District Officer his power of Chief Magistrate, and he practically becomes the head of the police in his district, and will in popular opinion be identified with the police Indeed popular opinion goes further, and considers that, deprived of his position as Chief Magistrate, the District Officer will be over-ridden by his police In Sir Antony MacDonnell's opinion there is substantial foundation for this idea Nothing is more manifest from the opinions which landlords and other native gentlemen have given than this that universal mistrust of the police permeates native society The cry from the native gentlemen consulted is, "let us have no change of judicial system, but let there be more control over the police" In the necessity for greater control over the police, the Lieutenant-Governor entirely concurs, as His Excellency in Council will have seen from this Government's letter No 1086, dated the 15th October, and he has no doubt that nothing would tend to diminish the control which already exists more than the withdrawal from the District Officer of the chief magisterial power in the district The Lieutenant Governor has not the least doubt that if the people of these Provinces came to believe that they had no longer in the District Magistrate an impartial authority powerful enough to protect them from police misconduct, it would become infinitely difficult to carry on the administration It is not a question of *prestige* in the sense of the word as used in disparagement by the advocates of separation it is a question of the trust and confidence of the people in their rulers Deprive a District Officer of the control and power over the police, which his possession of the chief magisterial power now gives him, and the people's confidence in him will certainly be shaken That would be fatal to our administration in present circumstances When education spreads and the police becomes better, it may be otherwise * * * * * * * * * * * * It is the possession of the power, and knowledge that can be instantly exercised, to bring an offender to justice, that over-awes the policemen or other powerful offenders, and emboldens the people to look on the District Magistrate as, to use their own phrase, the protector of the poor"

The above quotation I had not read when I wrote my note as Chief Commissioner of the Central Provinces in January 1912 It appears that Sir Antony MacDonnell's experience in Bengal and the United Provinces led him exactly to the same conclusions regarding the true meaning of the term "prestige" as had my own experience in the Central Provinces, and our independent conclusions were that a separation of the duties would lead to the District Officer being identified with the police as a prosecutor instead of being regarded by the people as protector I have reproduced this paragraph *in extenso* because I think that it expresses most clearly the utter fallacy underlying the disadvantages of the combination in the district officer of magisterial and executive functions The great mass of opinion behind the Lieutenant-Governor of the United Provinces cannot be flung aside as of no value The list contains the names

Other opinions

of many experienced officers who support their arguments with many illustrations The Taluqdars of Oudh were opposed to any weakening of the authority of the District Officer One English Sessions Judge, Mr Fox, was in favour of the

Opinion of Mr Fox

separation; he was the only English District and Sessions Judge who held this view I add his note as an expression of extreme opinion on the other side But his letter was addressed to the High Court of Allahabad, and Mr Justice Knox knocked the

Views of Allahabad High Court

bottom out of the cases that Mr Fox had quoted in support of his views The High Court Judges themselves recorded separate opinions Mr. Justice Aikman and Mr Justice Burkitt stated their opinion emphatically in favour of the present

Mr Justice Anderson's view

system Mr. Justice Anderson, a Calcutta Barrister, who had only been four months in the Allahabad High Court, refrained from giving any opinion as regards the United Provinces As regards Bengal, he accepted the examples cited by Mr Man Mohan Ghose's memorial without any attempt at analysis; but he made this important admission that he was unable to specify any particular instance, although in the course of practice in Calcutta he had come across other cases of a somewhat similar kind Again, he advocates the idea "rightly or wrongly held" that the District Magistrates bring improper influence to bear; but he adds—

"I cannot say that I had personally to do with any case in which the District Magistrate has thus improperly interfered, but I have been told by more than one Deputy Magistrate that in Bengal it is by no means a rare occurrence for the District Magistrate to suggest, if not actually to direct, the course which his subordinate ought to take"

The old failing appears here again As a judge he has seen cases like Mr Ghose's, but cannot recall them; and as regards any undue interference by District Magistrates in all his long practice, he has met none, and he can only fall back upon hearsay entirely untested

Mr Justice Knox's opinion is most clear and firm He was acting Chief Justice at the time, and his long experience entitles his views to carry great weight

Mr Justice Strachey's view

Sir Arthur Strachey, a Barrister Judge and the permanent Chief Justice of the Court, wrote as follows.—

"So far as the North-Western Provinces are concerned (and I have no sufficient personal knowledge to justify me speaking of other parts of India) I am opposed to the separation of executive and judicial functions During the whole of my experience at the Bar and at the Bench, I can remember no instance of abuse arising from the combination of these functions under the same hands, and my experience is from 1883 to 1901 I do not know of any practical evil to be remedied I believe that no such practical evil exists"

He goes on to show what ample safeguards the Criminal Procedure Code confers, and what complete protection it affords in all cases where the accused may feel a suspicion that the Court had any bias against him

I conclude the United Provinces opinions by referring to the attitude of the Indian District Judges.

Attitude of Indian Judiciary

Most of them seem to halt between two opinions on the one side thinking it essential that as judges they should lay great stress on the importance of excluding executive bias from judicial decisions on the other hand, as practical men, admitting that there would be great difficulty involved in a policy of complete separation

When one finds that all the executive officers from the Lieutenant-Governor downwards, all the Judges of the High Court (except one who had only been four months on the Bench), and most of the Taluqdars, in favour of the continuance and maintenance of the existing system, it may be truly said that the United Provinces replies are overwhelmingly strong against any separation of the functions

Weight of opinion in United Provinces strongly opposed to separation

24 *Burma*—The Government of Burma gave an unqualified vote against any separation The judicial authorities in Burma had only been able to unearth a single case of quite minor importance in which actual abuse had resulted from the combination of functions The records of the Secretariat disclosed one more case in which the District Magistrate had prejudiced a case when making preliminary enquiries, and his procedure was altogether faulty in regard to admission of evidence The case was not creditable to his fairness of mind, but the accused was acquitted on appeal The Burma Government considered this case to be isolated and unprecedented Their letter adds

Views of Government of Burma

In view of the fact that this and one other unimportant case are the only cases of abuse which were forthcoming after careful enquiry, the Lieutenant-Governor has no hesitation in stating that in Burma there is no practical abuse to be remedied"

Among the opinions of selected officers sent up with the Burma letter, I reproduce *in extenso* the letter of Mr Harvey Andamson (paragraphs 1 to 8) It will be seen later on how this letter differs from the opinion which Sir Harvey Adamson wrote as Member of Council in 1910, and from his last opinion given as Lieutenant-Governor of Burma, I can only suppose that Sir Harvey Adamson when in Council allowed himself to be over-persuaded against his better judgment by the influence of Sir Edward Baker into committing himself to the statement which he made in Council, a statement which I regard myself as most unfortunate and unwarranted by the facts of the case

Sir H Adamson in 1900 strongly opposed to separation

"With reference to your letter No 166-P-61, dated the 3rd May 1900, I have the honour to submit my opinion on the subject of the separation of executive and judicial duties

"The memorial appears to assume that in countries far advanced in civilization there is a complete separation between executive and magisterial functions But in truth the separation is not complete in any country The French system of police unites to a considerable

extent executive and judicial duties, as does the Continental police administration generally In England, with the exception of the Metropolis, the control of the police rests with Magistrates Prior to the Local Government Acts of 1888, it was exercised by the Justices of the Peace, and even now it is vested in a Committee consisting of an equal number of Justices appointed by the Quarter Sessions and by the County Council Justices of the Peace have also many other administrative and executive functions In Scotland the principle of separation is so little considered that Sheriff-substitutes who are Magistrates with powers extending to imprisonment for two years, and are Civil Judges, actually concern themselves in the detection of crime, as it is part of their duty to take the precognitions of criminals

"I am of opinion that no practical harm arises from such combination of executive and magisterial functions as exists in India The principle of judicial independence is fully recognised by District Magistrates who are men of education and honourable feeling They do not themselves try cases in which they have been in any way concerned with the investigation before trial, and when a case comes for trial before a subordinate Magistrate they leave it absolutely to his discretion This is the universal practice It is urged that the head of the district should not have judicial powers because he is interested in keeping his district free from crime This is a mere sentimental objection Do we not find in England Judges in their addresses to grand juries referring to the prevalence of a particular form of crime in their circuits and indicating the necessity for repressing it? Do we see them approaching their circuit duties with the professed ignorance as to the criminal condition of their charges, and the callousness and indifference which the memorialists appear to consider to be the first requisites of an impartial judicial administration? They are on the contrary as much interested in their way in the repression of crime in their circuits as District Magistrates in India are in their districts

"An analysis of the cases quoted by Mr Man Mohan Ghose," illustrating the evils of the present system in India, simply resolves itself into the one fact that certain Magistrates owing to their being wanting in temper and discretion have in certain instances strained their judicial powers or acted foolishly Such frailty is incidental to human nature, and while men are men, instances of it must occasionally be discovered in an area of search as large as India Similar abuses are common in all countries, even in England, as may be readily seen from a perusal of the pages of *Truth*, which devotes a weekly column to exposing them

"I venture to say that judicial abuses, which owing to the imperfection of human nature cannot be altogether eliminated, occur more seldom, and are more liable to detection in India than in England The machinery of the Criminal Procedure Code bristles with safeguards in justice In addition to the right of appeal, there is the power of revision which is continually being exercised by the Court of Session and the High Court both on their own motion and on application Safeguards are also provided by the Code for the accused before trial Thus section 191 provides that, when a Magistrate takes cognizance of an offence upon information received from any person other than a police officer, or upon his own knowledge or suspicion, the accused must before evidence is taken be informed that he is entitled to have the case tried by another Court, and section 526 provides that, if the accused before the commencement of the trial notifies to the Magistrate his intention to apply to the High Court for a transfer of the case, the Magistrate is bound to adjourn the case, and to give him an opportunity of doing so In no country has the Magistrate so little real opportunity of violating the law or acting improperly as in India He always feel even in the most trivial case that his word may not be the last in the matter, and he has an almost well assured certainty that any illegal or improper action will be subjected to the scrutiny of his superior officers Mr Man Mohan Ghose's cases give ample proof of this fact

"Those who desire to make a complete separation between magisterial and executive functions would leave the present District Magistrate in charge of the executive administration of the district He would be the head executive officer, the head revenue officer, and the head police officer, but he would have no magisterial powers, and would have no authority over Subordinate Magistrates The District Judge would take his place in these matters, the division of powers is quite contrary to oriental ideas of the fitness of things, and it would infinitely weaken the administration, than which there could be no greater evil in India In England the preservation of peace, the suppression of crime, and the punishment of criminals are mere matters of routine In many parts of India they are the very breath of life of the administration They are closely connected together and they cannot be kept in separate and independent hands without a loss of strength that would be disastrous

"Whether a scheme for separating magisterial and judicial functions by substituting the District Judge for the District Magistrate is practicable in other provinces of India, it is not for me to say But I am certain that it is impracticable in Burma The Subordinate Magistrates are untrained and unexperienced young men, when they are first posted to judicial work, and it is absolutely necessary that they should be subordinate to an officer who can constantly inspect their work and devote attention to their training This might be done by the District Judge if a District Judge were appointed to each district But this would be impossible in Burma without an expenditure that would be quite disproportionate There are few, if any, districts in Burma where there is sufficient judicial work to occupy the complete time of a District Judge It would be necessary therefore if the scheme were applied to Burma to put a District Judge in charge of perhaps three or more districts He would thus not be on the spot to give the close attention that is necessary to the training of the subordi-

nate magistracy Moreover, it is not only the District Magistrate who has mixed functions under our present form of administration Each subordinate magistrate has also the executive charge of his sub-division or township If magisterial and executive functions were separated, most of these officers would also have to be doubled, and the additional cost entailed would be so enormous as to wreck the scheme

To sum up, I believe that the connection between magisterial and executive functions is not closer in India than in other civilized countries, that judicial scandals due to the frailty of individuals are not more likely to occur and do not more frequently occur in India than in England, that the Criminal Law of India is provided with safeguards from injustice that compare favourably with those in the best governed countries of Europe, that the separation of magisterial and executive functions would weaken the administration, and would in a country like India be most mischievous and dangerous, that it would detrimentally affect the training of the raw material which forms the subordinate magistracy, and that whether practical or not from a pecuniary point of view in other provinces, it would be quite impracticable in Burma"

There is no more forcible utterance given against separation than that contained in the extract given above Could any one have foretold that in a few years time Sir H Adamson would be found preaching the gospel of separation?

The Chief Judge's view

Amongst the Judges of the Chief Court the Chief Judge Mr Copleston recorded his conclusions as follows:—

"My conclusion after consideration of this matter from the executive and judicial point of view is that the objections to the present system are mainly theoretical and not practical While on the other hand the advantages of a centralized authority and control and of economy are undoubted and considerable"

Mr C E Fox, who had been Government Advocate in Rangoon for many years, had been unable to discover any case of injustice arising from the system He thought that the District Magistrates were satisfied with a lower standard of evidence than the Sessions Judges and that in some cases their connection with the police might influence them, but he also adds.—

Mr Fox's view

"Apart from theoretical and possibly practical disadvantages such as those as I have referred to, I am not aware that the combination of judicial and executive functions has any practical disadvantages in these Provinces"

Upon this note Mr Copleston, the Chief Justice, remarked.—

Mr Copleston on Mr Fox

"I have read Mr Justice Fox's remarks and agree with him that District Magistrates do occasionally convict on less evidence than would satisfy a purely legal and detached mind, but I do not think it follows, or is the case, that wrong conviction due to bias, or administrative zeal, takes place except on rare occasions. Wrong convictions are due, as a rule, to ignorance or want of sufficient training in the weighing of evidence But it is the greater advantage to have Magistrates with a knowledge of the habits, customs, and language of the people than that magisterial work should be done by officers who have had purely legal training"

The remarks of other Judges are not of very great importance But Mr Justice Birks says in common with the Chief Judge:—

Mr Justice Birks

"I believe that in the great majority of cases while district officers are anxious to see that guilty persons do not escape on technical grounds, they give accused persons a very fair trial

The Judicial Commissioner of Burma, Mr Thirkell White, who was afterwards Lieutenant-Governor, is greatly opposed to any separation, and writes (para 13)·—

Mr Thirkell White's view

"The District Magistrate as head of the police does not as a rule take personal part in the detection of crimes any more than as head of the Forest Department he personally marks trees for girdling His function is to control, direct and supervise It may safely be said that no Magistrate in trying the case reflects that the District Magistrate is head of the police and inclines to convict in consequence In this province the low average of conviction is evidence of the truth of this assertion Undue interference by the District Magistrates with the judicial discretion of his subordinates is also very rare I have come across instances of irregular references by subordinates to District Magistrates, but not of any abuse of power in consequence As I have said, I am not acquainted with any case in which a District Magistrate has exercised undue pressure on a subordinate Magistrate to secure a conviction or a severe sentence I can call to mind cases in which magistrates have acquitted in trials instituted by the District Magistrate, The mere fact that a District Magistrate has executive functions does not necessarily render him blind to the impropriety of interference with the judicial discretion of a subordinate Even if the proposed separation were effected, there would always

and necessarily be a series of ascending ranks of judicial officers In that case there would still be room for abuses The District Judge, for instance, might direct a prosecution for perjury committed before himself He would send the case for trial to the subordinate Magistrate He would be just as likely (and just as unlikely) to order the Magistrate to convict the accused as a District Magistrate would be under the present system to order a conviction in a prosecution instituted by himself in his executive capacity So long as there are grades, so long will it be possible for superiors to exercise improper pressure on inferiors The safeguard is the high standard of integrity which exists in the public service in India, not any artificial supervision of functions"

Burma is a Province in which union of functions was at that time, at all events, more complete than anywhere else in India It was also a place in which, outside Rangoon, public opinion was less advanced than in India But here also the highest authorities, both judicial and executive, were agreed that no separation was desirable

25 *Bombay*—The next Province that I come to is Bombay The Bombay Government wrote a very strong letter in support of the existing system, examining the opinions obtained, and analysing the cases to which some of the Judges of the High Court had adverted If the Judges of the High Courts could produce nothing more serious than the errors which they had put right in the cases they have quoted, there could be no better testimony as to the petty nature of the evils that arose from minor courts Indeed the mistakes were individual mistakes liable to be committed by any Magistracy, however select The remarks made by the Bombay Government on the case cited by Justice Badruddin Tyabji (the only Mahomedan ever elected President of the National Congress) are most scathing

View of Bombay Government strongly in favour of existing system

I invite the special attention of my Hon'ble Colleagues to the Bombay letter, [illegible] to the notes of the Judges of the High Court

Views of the Judges of the Bombay High Court

Justice Ranade did not find evidence of any improper action on the part of District Magistrates, but thought that subordinate Magistrates should be separated

Mr Justice Tyabji came very badly out of the controversy when some of the statements he made were investigated and he was obliged (after a vain effort to prove his case) to shelter himself behind the statement that his information had been confidential, having been apparently drawn from a relative of his own in the Civil Service, who had been badly reported upon.

Mr Justice Tyabji

The following remarks of Mr Justice Badrudin Tyabji indicate how unreliable his opinion on the separation is.—

"All great public associations and organs of native public feeling and Indian gentlemen of experience have, so far as I know, been desirous of the change for many years The poorer and the less educated classes have also, according to my experience, been desirous of the same change I have had many opportunities in various public capacities and in various parts of India of knowing their feelings, and I believe I am not wrong in saying that they desire the change even more anxiously than those who are able to make themselves better heard I think the feeling of the masses of the people is that it is hopeless to expect pure justice from the officer who, directly or indirectly, is also the prosecutor in the case I know of places where a perfect reign of terror has existed in consequence of the combination of these inconsistent duties in the same officer I also know of a case where the accused was sought to be convicted and sentenced on no other evidence than a mere note from the head district officer".

This language of exaggeration defeats its objects, and the statement about the masses is not borne out by any other opinion and not even from Bengal

Yet, later on, he writes :—

"But I do not of course say that, as a matter of fact, justice is not done in the majority of cases On the contrary I believe that in spite of the difficulties I have pointed out, Magistrates do their duties ordinarily with fairness and justice But what I desire to impress upon Government that people rightly or wrongly distrust the officers, and do not believe that any real justice can be done under the circumstances to which I have adverted My own opinion

is that the people are entitled not only to justice pure and simple, but also to justice which is above suspicion, which they recognise to be free and impartial and independent That is not the case at present, and will not be so unless and until the two functions are separated"

Upon this the only comment that I have to make is a challenge Will anybody say that the people regard the men now filling the ranks of munsiffs and Subordinate Judges as more impartial and more high-minded than the District Magistrates and the Assistant Magistrates?

Sir Lawrence Jenkins

Sir Lawrence Jenkins, although in favour of separation in the case of Subordinate Magistrates, has a paragraph about District Magistrates which runs as follows.—

Though on abstract principles I am strongly opposed to the combination of judicial and executive functions, yet I would not at present urge that District Magistrates, at any rate in the Bombay Presidency, should be deprived of their judicial powers The possession of these powers appears to me to be of value and to increase the usefulness of these officers, nor have I known or heard of their abuse at any time in this Presidency"

Mr Justice Ranade

Mr. Justice Ranade who strongly advocates separation on theoretical grounds has the following paragraph.—

"As the abuse of power on the part of District Magistrates has been found by experience to be very rare, and the temptations to abuse, as also actual abuse, are more operative in the case of subordinate officers, I would for the present confine the question of reform to this last class of officers There is an additional reason for making this demarkation The District Magistrate discharges the useful function of acting as a common link between the Government and the people He represents the wants and needs of his district, and in many cases he takes a pride in his work He acts as an adviser and exemplar to the young Magistrates, and controls the police and the different departmental agencies He superintends the work of education, medical relief, vaccination, prisons, the local municipal and other bodies, irrigation, public works, sanitation, survey and settlement, and a thousand other functions associated with Government The subordinate Magistracy has not to discharge these duties, at least to the same extent In the cases, therefore, of the District Magistrate, there are good reasons to think that not only the abuse of power is less to be apprehended, but also the advantages of his combining all the functions of Government are so great as to outweigh the chances of abuse of his power These expressions do not hold good in regard to the subordinate Magistracy"

Mr H Batty, afterwards a Judge of the High Court

A notable contribution is that of Mr H Batty, the Legal Remembrancer, who is a Civilian Barrister I have not for the sake of space included it in the annexure to this note, but I quote briefly from it He writes —

"Eminent as are most of these names appended to the memorial among the papers, it seems important to note on the threshold of discussion that with the exception of the late Sir Charles Sargent and Sir W Wedderburn, none of the signatories would appear to have any experience of this Presidency, and none of those eminent authorities would appear to have contributed to the discussion anything beyond generalities on the advantages of an independent judiciary"

Later on he says:—

"Instances of interference are cited in the memorial to be of daily occurrence This may be true of Bengal It is unconceivable that if it were true of this Presidency, such instances should never come to light And if the District Magistrates have so effectual and prompt a mode of dealing with subordinate Magistrates who differ from them, there could be no necessity for the constant appeals against acquittals and application made by District Magistrates and to the High Courts for the revision of magisterial decisions"

He admirably controverts and condemns Mr Man Mohan Ghose's arguments and adds.—

"A discussion on abstract principle is not invited in the letter of the Government of India But I would venture to submit that a study of legal subtleties is not necessary for the disposal of ordinary magisterial work It is, I think, much more important that Magistrates should have some knowledge of and sympathy with the people, and should be familiar with the business of their daily life, and their customs, cares and sorrows than that he should have mastered technical difficulties which in exceptional cases may arise from decision in appellate courts"

Sir Evan James' letter

Of particular forcefulness is the letter of Sir Evan James, at that time Commissioner in Sindh, who had some knowledge of Bengal as well as Bombay

I quote the following paragraphs from this letter :—

It is curious that the class of Natives who are anxious for the removal of judicial powers from the Magistracy invariable abuse the Police Mr Dayaram Gidumal does so, for one The Police are what their birth and education have made them—no better and no worse than Natives generally But they require a tight hand upon them to prevent mal-practices, especially when the rank and file of them are so badly paid One would think to listen to the Native press that the Police were worse than any other class But the chicanery that goes on in the purlieus of our Courts among the Pleaders (who control the Native press and consequently never abuse themselves), the concoction of false evidence and the like single them out as needing even more reprobation A case reported recently from Bengal shows that even Native barristers-at-law are not always above objectionable practices The best among the Police and the Pleaders (and there are plenty of most respectable men in either branch, and the number increases daily) condemn the mal-practices of the black sheep But it is because there exist black sheep, who take advantage of the timidity of most Natives and use their powers for oppression or corruption, that the District Magistrate must have full control over the Police I include amongst them the English Superintendent of Police, whose ardour for punishing crime, stimulated as it sometimes is by the undue prominence given in Government reviews of annual reports to the names of those in whose districts the percentage of convictions is high, tends to make him biassed Take away Police control from the experienced District officer of the present type, *i e*, the man of affairs, who has done much judicial work, and put it under a Collector without the balance and fair-mindedness and ability to gauge the value of evidence which comes from trying cases, and disable him when an unusually difficult and important case occurs from either trying it himself or from selecting some suitable, judicious and unbiassed officer to try it, and the evils of our Police system will be intensified to a degree The papers sent for opinion do not refer to this objection nor to the natural consequences, *viz*, that the control of the Police would very soon have to be placed once more under a Judicial officer, who, *ex hypothesi*, would be the District Judge, like the Egyptian Police under Mr Justice Scott The Indian District Judge would then become, in his ardour to repress crime, the Public Prosecutor as well as Judge, or, more likely, the Superintendent of Police, and his force would be liberated from all real control

That the Executive Government would ever permit the control over the Police in India to be removed from the Executive's hands is not, of course, likely It would be an act of insanity and a blow to the permanence of British rule But a good many of those Natives who aim at taking away magisterial powers from Collectors and Assistant Collectors have got that in their minds as the necessary ultimate corollary of the limited measure to which at present they confine the reforms they advocate Under the *ad captandum* cry of "Judicial independence of the Magistracy," the subordination of the Police to the Native Magistracy and Judiciary is the real goal aimed at I for one say, therefore, "*Obsta principiis*"

The other remark I wish to make is that the cry only comes from Bengal, where for some years it has been sedulously manufactured And I must protest now, as I have protested in the Viceroy's Legislative Council, against Bengal being a law unto the Empire When the present Criminal Procedure Code was being passed, the evil influence of the Bengal Native bar was for ever manifest Now Bengal (in which Province I served for several years in charge of an outside Department) differs *toto cælo* from other parts of India in its people and in its land tenures There exists, for some reason or other which I could never quite fathom, an intense degree of jealousy, pure and simple, on the part of the bar towards the District Magistracy They dislike and fear the coercive powers with which the law invests the Magistracy, and they bitterly hate the Police They are a powerful and influential body, and they wish to have the manipulation of crime and everything else to suit themselves. The creation of an independent Magistracy would, moreover, mean the creation of a number of additional posts, which would in time come to be filled only by passed Pleaders Their cry has penetrated to the Calcutta High Court I have heard a High Court Judge (now retired), in the presence of the late Viceroy, lauding in a public speech the late Mr Mano Mohan Ghose for his persistent advocacy of the policy now under discussion, and we now see that a retired Law Member and a retired Chief Justice, and even a retired Member of the Board of Revenue, can support it. My personal impression is that the powers of the Executive require more careful maintenance in Bengal than anywhere else, because of the weakness and timidity of the Native Magistracy and of the large number of rich and influential zamindars and planters who may oppress the poor with impunity, if fearless District officers are rendered impotent But even supposing that the Government of India were to accept any change in Bengal, I urge very strongly that this should not be made a precedent for the rest of India The administration of justice might get completely out of hand in Bengal (I ought, perhaps, to except Behar) and the Empire would not be endangered The reverse would be the case if the same thing happened in countries inhabited by martial and turbulent races, where the District Magistrate is not merely the pivot, as Sir Charles Elliot observes, but the foundation on which British power rests India is not governed by the Viceroy or by Governors or by Chief Commissioners. It is governed by the District Officers

Sir E James puts his finger upon the real object with which the Calcutta Bar are agitating for the so-called reform It is not the righteous indignation of the man of supreme ideals of justice but the desire to secure all magisterial posts of India for the Indian lawyer.

Mr Whitworth, Judicial Commissioner of Sindh, puts forward another very important point.—

Mr Whitworth

"The other consideration which I think should put a limit on the process of separation is the necessary requirements of the English portion of the Judicial Department itself In this connection the fact that we are foreigners in India does not seem to me to receive sufficient attention What we have first to look to in a judge is not the knowledge of law but knowledge of the people It is, I believe, a peculiarly English habit of mind to regard law as something very technical apart from ordinary life At any rate, it is obvious that law cannot be well administered without a competent knowledge of the people among whom it is to be enforced It is essential therefore that English civilians should not be given purely judicial functions until they have acquired considerable experience of the country For their effective training, whether to become Judges, or Collectors or Magistrates, I would keep judicial and executive powers combined, as they are at present, and regarding the special connexion of the Magistrates with the police, I would add this that if it is bad, as some people think, for the Magistracy to be connected with the Police, it is on the other hand good for the Police to be connected with the Magistracy The influence of the judicial control may not be very great, but so far as it goes, it cannot but tend towards improving the standard of police methods"

One after another the most experienced officers in Bombay (including a man of so radical views as Sir Frederick Lely) have given their testimony as to the fatal result of making this separation I make no apology for adding one more opinion to those included in the appendices to this chapter, that of the late Sir John Jenkins, then Collector of Salt Revenue, Bombay. It is one of the most soberly written, clearly argued, and forcible opinions recorded, and I have no doubt that it will greatly impress my Hon'ble Colleagues. In paragraphs 5, 6, 7, and 8 of the late Sir John Jenkins' note, we have a clear and definite expression regarding the headship of the District Officer when translated into actual fact. His experience in Bombay coincides exactly with Sir Antony MacDonnell's experience in Bengal and the United Provinces and my own in the Central Provinces In paragraph 6, after describing Indian society, he writes :—

Sir John Jenkins' opinion

"This is a true justification of the combination of powers in the hands of the Head of the district, not the strengthening of Government but the protection of the people, and I believe that the powers are loyally and faithfully exercised to that end"

No one rising from the perusal of the Bombay papers could hold any opinion, but that they had fully made good their conclusions which were .—

(i) That in the Bombay Presidency no abuses have resulted from the present system, and there is no practical evil to be remedied

(ii) That, if in other parts of India where a similar system has obtained, abuses have occurred experience in the Bombay Presidency has proved that such abuses are not the necessary result of the system, but are due to faulty administration

(iii) That the present system possesses great advantages, some or all of which would be lost under any other system which could be adopted, and that no change is necessary or desirable

26 *Central Provinces* —The next province to be considered is the Central Provinces Sir Andrew Fraser's opinion is recorded in the Central Provinces letter and represented 30 years' experience With it he forwarded a brief note by Sir Stanley Ismay, the Judicial Commissioner of the time, a most eminent lawyer and the equal of any High Court Judge Sir Stanley Ismay's theoretical objections against union of functions are stated with the usual force He regarded the union from the lawyers' point of view as an anomaly; but he writes :—

Sir Stanley Ismay's views

"I should be very averse to think that the present system (save in very exceptional instances) has led to any actual abuse, but I know from practical experience how hard it is to dissociate from one's own mind the knowledge acquired outside the record of a case"

As regards the Subordinate Magistrates he did not believe that improper influence is exercised over them; but he considers that the average Native Magistrate required skilled supervision If a highly trained judicial officer were available for this purpose, then from the judicial point of view it would

be unnecessary to retain the magisterial power to District Officers Having thus given his opinion as to the ideal system from the point of view of a Judge, he next proceeds to give the all-round views gained from his 29 years of experience.—

"There is another side of the question, which cannot be ignored To deprive the District Magistrate of his prestige, might entail the most serious consequences Moreover, I do not believe (and I speak from an experience of 29 years) that any change on the lines suggested would be popular with the mass of the people"

His last paragraph sums up the case as follows:—

"Assuming that financial difficulties might be got over, there are two courses open to Government Either we should retain a system which from a judicial point of view is certainly open to some objection, but which at the same time has worked fairly well in the past and is working well in the present, or we should elaborate a new system which might result in raising the judicial standard and which would satisfy the reform party, but which from the administrative point of view might entail disastrous results The time may come when it will be possible to adopt the latter alternative, but in my opinion the time is not yet"

I regard the opinion of Sir Stanley Ismay as a very valuable one As a Judge he sees the side of the case which appeals to English lawyers and High Court Judges, and unlike them his long and ripe experience of district administration shows him the impossibility of sacrificing the true secret of the success of our administration to theoretical perfection

My own opinion as Chief Commissioner is recorded in a Note of January 1912 and will be considered in connection with a later chapter In my early days I sat from morning to night doing criminal and civil cases, none of my Deputy Commissioners ever indicated to me what I should do, and the independence of the Magistrate *quoad* the case he was engaged on trying was regarded by me as the first principle of my work

The other two opinions recorded are those of two Commissioners One a man of 37 years district experience gained both in the Police and the Magistracy He was one of the most fair-minded men that one could meet. The other is that of a man of brilliant abilities (Sir Bampfylde Fuller) with little judicial experience but with the most intimate knowledge of the people gained both in the United Provinces and the Central Provinces Both these two officers, brought up in entirely different schools, were dead against a separation

27 *Punjab*—Next in order comes the Punjab letter. We have an equally emphatic opinion from Sir Mackworth Young, the then Lieutenant-Governor of the Punjab The letter is well worthy of perusal I reproduce here only paragraphs 10 and 11, in which after quoting Sir Frederick Halliday's opinion, the Lieutenant-Governor remarks:—

Sir Mackworth Young's view

"To these objections may be added that separation would result in great loss of power and increase of expense, and so far from improving would probably impair the quality of judicial, and perhaps also of executive work The exercise of judicial powers is likely to cause an executive officer to view a question from a legal and impartial standpoint, not the reverse, and the sound decision of criminal cases depends far more on knowledge of native character and ways of thinking, such as executive officers are likely to acquire, than on a close adherence to the methods and rules which the long experience of English lawyers has dictated There is nothing recondite about our Criminal Codes, at least as regards those parts of them with which Magistrates usually have to deal The laws of evidence applicable to criminal trials are simple enough The difficulty is not as to the law, but as to the credibility of the evidence, and the power of weighing native evidence is acquired mainly outside court rooms *Prima facie* better magisterial work may be expected in substance, if not in form, from the man with the training of a tahsildar than from a man of the Munsiff class with sedentary habits and narrow experience, and if the separation between the judicial and executive branches of the service were complete, the majority of our first class Magistrates would be promoted Munsiffs Further, the executive head of a district, if he exercised no judicial powers, would be apt to look at criminal matters from a purely police point of view At present he looks at them with the eye not of a policeman only but of a judge, and his influence prevents the police being carried away by professional bias

11 The suppression of crime depends on—

(*a*) a well trained and honest police;

(*b*) an efficient, fearless, and honest magistracy,

(*c*) a guiding hand on the administrative machinery which postulates some union of the judicial and executive.

"More effective supervision over the police would be practicable were the head of the district not also a Magistrate actually spending a good deal of his time in hearing cases On the other hand, as stated above, a Magistrate, as head of the police, is more likely to view police matters from a fair and unbiased standpoint than if he is deprived of all judicial power and the detective and police part of his duties brought into unbalanced prominence Sir Mackworth Young thinks that the advantage of increased leisure to control and supervise police working can be given to the head of the district in another way, as will be explained below, without incurring the disadvantages attaching to his complete divorce from judicial functions The officer best qualified to control and supervise the Subordinate Magistrates is one who possesses an intimate knowledge of the characteristics of the people, the criminal methods to which they are most addicted, and the working of their minds These qualifications would often be wanting in a District Judge wholly occupied with judicial work He would not be able to move about among the people of the district in which he was serving, and would depend for much of his knowledge on what the Deputy Commissioner might choose to tell him It might easily happen that the relations of the two men were not such as to promote free interchange of views, and it seems likely that the subordinate magistracy under a District Judge would tend to be not only less capable, but likewise more corrupt, than it is at present The maintenance of order is also intimately connected with the prestige of the officer conducting the administration of the district The prestige does not spring to any extent from the fact that he tries 30 or 40 important criminal cases in the year, but from the circumstance that he is "hakim" or governor in the oriental sense, that is to say that authority is centred in him So long as he is head of the whole official hierarchy (with the partial exception of officers engaged in civil case work), and there is no rival authority in the district, his prestige is safe, but his position would be weakened by the presence of coadjutor, quite independent of him, and of a large class of important officials with whom he had no direct relations"

Views of other Punjab officers

Of the opinions of executive officers with which the local Government is supported I include in the appendices that of the late Colonel Parsons whose note is original, interesting and instructive On the judicial side I need only refer to the widely different views of his civilian judges the Chief Judge, Sir William Clark, and Mr Justice Robertson.

Divergent judicial opinions

The Chief Judge is entirely opposed to the separation Mr Justice Robertson begins with so violent a statement of the case for separation that one is rather astonished to find him go on to say—

"In my opinion therefore it is not necessary rigidly to separate judicial and executive functions as regards individuals, but it is necessary rigidly to enforce complete separation in their exercise by the one individual"

In another part of his note he said :—

"To come to the concrete question of the separation of the executive and judicial functions I have no hesitation in saying that they should be kept absolutely and entirely apart But I do not think that it by any means necessarily follows from the rigid separation of the functions that the same individual should never be invested with both judicial and executive functions It appears to me a *non sequitur* to say that because judicial and executive functions should be kept entirely separate, as indeed it is incontestible that they should be, that therefore the same individual should not be allowed to exercise both The separation of the functions should be emphasised in every possible way; but at present I am decidedly in favour, subject to the proposals made above of giving the District Magistrate judicial functions and the supervision of subordinate Magistrates very much as at present"

Later on he adds —

"It may be that the excellent material of our District Officers has caused the system to work better than *a priori* theories might have led us to expect, but my experience is that as a class the District Magistrates, who are unquestionably unusuallyable and conscientious body of men, have in the past rarely proved incapable of properly differentiating between their judicial and executive functions, and when they do so fail there is always the power of revision by the High Court"

The cases of abuse brought to light in the Punjab consisted of one case 20 years old and two extraordinary vagaries on the part of one Captain B who was degraded from an officiating District Magistrate to be a Magistrate of the 2nd class There has never been any hesitation on the part of Government to punish their servants in the rare case in which they have abused their powers

Reasons for giving Bengal case special consideration

28 *Bengal*—I now come to the case of Bengal: This requires very special consideration, because.—

(*a*) it has been in old Bengal that the case for the separation has been most diligently proclaimed.

(*b*) it is in the Calcutta High Court that the feeling against the powers of the executive has been traditionally strong from the days when in 1777 there was actual collision between the Governor-General and the lawyers, troops being used to support the views of either side

(*c*) it is in Bengal that the proposal was made to make an experimental start

Calcutta High Court

I will begin with the Calcutta High Court First I will take the opinion of the Chief Justice Sir Francis Maclean Having accepted the memorial, as if it had the authority of one of the Gospels,

Views of Sir Francis Maclean

he proceeds to say that if the arguments do not convince the Government of India that the system is bad, nothing that he can say is likely to turn the scale Later on he says —

"It may well be that there are still portions of India where, as a matter of policy, it might be imprudent to at once deprive the executive officer of certain judicial functions, but to be told that in the greater portions of Bengal the exigencies of good government require that the executive officer must possess the power of punishment, that he should be at once policeman, prosecutor and Judge imposes a somewhat severe strain upon one's knowledge of the situation If the union be in principle unsound, as it appears to me to be, its maintenance can only be justified upon the ground of some imperative policy which is a question for the Statesman and not for the Judge, and if those who are responsible for the government of India say, that, in the interest of good and successful government, the union and judicial and executive functions in one and the same officer is essential, there, so far as Judges may be concerned, is an end of the matter"

The Chief Justice has set up the usual ninepins in order that he may knock them down Nobody wishes that the same officer should be policeman, prosecutor and judge, nor does he combine these functions in any part of India. These fallacies are entirely dispelled by the minute of Sir Henry Prinsep, who had the unique experience and knowledge, having been a District Magistrate before the creation of a special Police Department, and who has watched the developments that have taken place in the three successive Criminal Procedure Codes and the introduction of every imaginable safeguard against prejudice, all of which have been entirely ignored by the memorialists He demonstrates conclusively by an analysis of the duties performed by the District Magistrates what utter trash is the talk about combination of the functions thief-taker and Judge and all the other old "ad captandum" phrases with which the memorial is garnished He also shows how in the cases cited the improper action if any taken was executive and not judicial, and might equally arise if the separation asked for had taken place

Mr Justice Prinsep's view

There is another very important point in his opinion The Judges are apt to lay stress upon the fact that though the cases of actual abuse are rare, yet their occurrence at all impresses the people with the sense that justice is not quite pure and impartial Sir Henry Prinsep refutes this in the following language —

"I cannot however leave the subject without noticing the opinion expressed by some of my colleagues that the criminal courts have lost the confidence of the people We in Calcutta are not in a position to form or express any such opinion Still as this opinion has been expressed by some whose experience is certainly less than mine, I venture to challenge its correctness, for I feel sure that if proper enquiry be made outside of Calcutta and beyond the influence of those whose interest it is to induce others to accept their views in this respect, it will be found that the people of this country have every confidence in our local courts to protect them against injury and oppression, and that in spite of all objections to his being also the head of the police, the parties would with very rare exceptions prefer that their cases should be tried by the District Magistrate rather than by any other Magistrate Such objections very seldom suggest themselves to the parties, but are made on their behalf by local legal advisers whose object is almost always to embarrass the proper action of the Courts"

Sir Henry Prinsep then goes on to say that the ideal system would be to have a separate head of the Police, but it is quite outside the question to remove magisterial control from the Police at present He also gives his reasons for considering Mr. R C Dutt's separation scheme* to be impracticable.

* *Vide* note on page 7.

As to the opinions of the other Judges Mr Justice Ghose produced some cases said to illustrate the abuses of the system which Sir Thomas Raleigh later on examined He proceeded on the assumption that the District Magistrate continues to direct the investigation of the Police, and he would place the whole of the Magistracy under the Judge Mr Justice Rampini puts forward a quite impossible scheme in which while the Magistracy would be under the Judge, the Collector would be able to supervise them from an administrative point of view

Sir Chander Madhub Ghose's view

Mr Justice Rampini's view

Mr Justice Ameer Ali, another advocate for separation, would only extend the system to the advanced districts of Bengal and to other parts of India similarly situated He writes .—

Mr Justice Ameer Ali's view

"I do not for a moment advocate the separation of the two functions throughout India, utterly regardless of the local conditions and necessities. In my opinion there are many districts where a continuance of the old system is needed"

He like some other Judges points to the successful separation of the functions in the Presidency towns as indicating similar success in the mofussil

Mr. Justice Stevens states that if separation were to be effected, a quite separate magisterial service would have to be maintained with a separate Chief Magistrate, he demonstrates that the Judges will be unable to inspect subordinate Courts properly He writes —

Mr Justice Stevens' opinion

"I have examined the detailed statistics of the inspections of subordinate Civil Courts and Offices made by the District Judges during the year 1899 with the following results Only three Judges out of 29 (inclusive of the Judicial Commissioner of Chota Nagpur) inspected all the Civil Courts subordinate to them, seven made no inspections at all, while in the remaining charges the percentage of subordinate Courts inspected varied from 5 88 to 88 88"

Mr Justice Brett's Note points to the same conclusion, but he considers that if the Magistrates were employed exclusively on magisterial work, there would be fewer suggestions of influence or pressure exercised by District Magistrates Such suggestions are at present now often the result of want of experience, knowledge, or self-reliance, in the subordinate Magistrates than of any attempt to control their independence

Mr Justice Brett's opinion

The opinion of the High Court of Calcutta may be said to be divided The usual theoretical objections are taken to the combination of the functions mainly on the wholly erroneous assumption that the District Magistrates first investigate and work up the prosecution and then try the case Those of the Judges who had no experience of district administration pronounced in favour of a change Those who had longest and best experience were unable to recommend one When it come to a constructive policy they were unable to agree as to which system should replace the present system The only Judge who really tried to examine and analyse the position was Sir Henry Prinsep, who was firmly opposed to separation The Chief Justice's attitude was that if the executive Government pronounced the separation to be impracticable, there was an end of the matter. In regard to the argument that the mere impression that justice was not quite impartial rendered a change necessary, Sir Henry Prinsep refuted the fact; and Mr. Justice Stevens on this subject writes .—

The opinion of the High Court divided

"It is unquestionable, I think, that the feeling of that section of the people of this country which is accustomed to give publicity to its opinions is strongly against the present system; but from such experience as I have had of the interior of the country I venture to think that it may be open to some doubt how far that feeling is shared by the simple folk who form the vast majority of the population These, I believe, are generally disposed to regard the principal local executive authority, not as an oppressor, but as their friend and protector and the redresser of their wrongs"

I may add that in response to the request made by the Government for the High Court to give details of any case during the last five years, the High Court

No details furnished of case indicating abuses.

intimated that the collection of such cases would require considerable time and trouble, and would take up too much time of the officers of the Court, and they had therefore refrained from ordering its collection This is not much of a testimony to the prevalence of the abuses, or to the strength of conviction of the Hon'ble Judges that the existing system was anathema and should be rooted out at all costs

Views of Bengal Government

I come now to the considerations of the Bengal Government papers The letter of the Government of Bengal is among the appendices to this chapter/

Sir John Woodburn's view

The letter of the Lieutenant-Governor of Bengal, Sir John Woodburn, who had experience of three Provinces and had been a member of the Governor General's Council, merits most careful study, and is full of reasoned arguments He quotes opinion of men like Sir Fitz-James Stephen, Sir John Strachey, and in paragraph 7 of his letter records the following emphatic opinion .—

"The main objection which has been taken to the adoption of "a scheme for the separation of Executive and Judicial functions is that it must tend to weaken the authority of the District Officer, and Sir John Woodburn must here express his deliberate opinion, founded on the experience of his whole career, that any change which could entail such consequences may be fraught with the most serious consequences to the administration of the Empire"

In paragraphs 5 and 6 the Lieutenant-Governor analyses the work of the District Magistrate, and shows that the greater part of his functions is really executive in nature, and that the transfer of these powers would be merely to transfer the many executive functions to the Judge which from his position he is unable to discharge In paragraph 10 he discusses the complete fallacy of supposing that the Calcutta system is any guide to the system which would work in the interior. In paragraph 11 he writes:—

"The memorialists have asserted that a change in the present is demanded by the general voice of public opinion in India The Lieutenant-Governor must take leave to state that no proof whatever of this assertion is offered, and that such indications of public opinion as are available point altogether in the opposite direction The popularity of the present system of the administration of justice is acknowledged in the papers which accompany the memorial It may be conceded that litigants often have recourse to the law Courts for the purpose of harassing their neighbours and of seeking some improper advantage, but the fact remains that in the popular opinion justice is obtainable from the Courts, and it is notorious that the people prefer to have their cases tried by the District Magistrate himself or a European officer, if possible The confidence which the people repose in the District Officer is proved by the readiness with which they appeal and petition to him in cases of alleged oppression and wrong It is significant that they always remember best, and remember with an affection, reverence and admiration that shows their discernment of character, the District Officers who have shown themselves strong, just and energetic in the exercise of their combined functions If it were true, as alleged, that the people distrusted the Court because of the combination of executive and judicial functions in the District Magistrate, they would long since have shown their aversion in a decided manner It is to the District Magistrate, not to the District Judge, that the peasant appeals for the remedy of every wrong and the redress of every grievance This is the voice,—the voice, however, of a fearless confidence,—that he who hath ears to hear in India recognizes universally The Indian National Congress may speak with another voice But they are themselves perfectly conscious that they are in no sense representatives of the people They are a knot of platform gentlemen to whom we listen good-naturedly and sometimes quite seriously and sympathetically, but they say not what the people say, but—which is quite different—what they want the people to say"

In paragraph 18 Sir John Woodburn discusses the variety of the schemes suggested by the various supporters of separation, and how utterly impracticable they are Finally in paragraph 20 Sir John Woodburn sums up his conclusions in the following words —

Sir John Woodburn's conclusions

"The main questions formulated in your letter under reply have been fully discussed in the preceding paragraphs No Government has ever contended that the present system is a perfect one but it is claimed for the system now in force that it has practically been a success, and that its advantages are fully recognised by the people at large The evils to which it is liable, through the indiscretion of individual officers, have been grossly exaggerated The likelihood of their recurrence is ever decreasing The present system was substituted for a system which had failed, which the memorialists seek to re-establish with very few limitations, and which we know from experience would in its turn be attended by abuses more grave and more injurious than those which the present system has studiously corrected and reduced The Lieutenant-Governor considers that the present system, though it may be anomalous

according to the highest standard of theoretical perfection, is in all essentials as good a system as can be devised with reference to the existing circumstances of Bengal It maintains the indispensable position of the District Officer It provides for a fair trial for the accused person It imposes checks upon the District Magistrate, and provides for appeals and motions against his orders It enables him to supervise the work of his Subordinate Magistrates, to see that it is properly performed, to take measures for the preservation of peace and order, for the protection of life and property, for the administration of justice and the prevention of injustice There is no general ground for the insinuation that the District Magistrates habitually interfere with the judicial independence of their subordinates, or that their supervision or control is improperly exercised The Subordinate Magistrates cannot be left altogether free of executive control, and it is not only of importance but necessary that they should endeavour to do their work well The time of the District Judge is already too much occupied to admit of his undertaking more work The District Magistrate has no personal interest in the conviction of any individual accused otherwise than to see justice done The interference of the High Court and the supervision of Government can be easily solicited and rapidly exercised, and are sufficient to rectify any illegalities or improper sentences, when technical irregularities are committed by officers who are anxious to do substantial justice, they can be set aside if sufficiently serious Theoretically, a perfect system of administration would require the separation of all the departments, Judicial, Revenue and Police, under separate officers of various grades Such a departmental system would be entirely different to that which now obtains and has borne the test of time It would be a radical change in the form of administration in India, and its consequences could not be fully foreseen The cost of such a change would be enormous But the conclusion of this examination of the case is that no such change is necessary or desirable, and that there is no occasion to sacrifice at the altar of theory the good that has practically resulted from, and is still attained by, an efficient though necessarily anomalous system

"In short, on the issue, as framed by the Hon'ble the Chief Justice of Bengal, the Lieutenant-Governor, as responsible for the administration of the province, is of the clearest opinion, on the grounds put forward in this letter, that in the interest of good government, *i e*, of general administrative expediency, the union of Judicial and Executive functions in the District and Sub-divisional Officers is at present essential"

Mr Munro's opinion

Among the opinions accompanying the Bengal letter, are those of all the Bengal officers of experience. With one exception they are firmly against any tampering with the present system I will not trouble my Hon'ble Colleagues to read all those opinions *in extenso*, but I make an exception in favour of the opinion of Mr. James Munro, C B, whose cumulative experience as a Commissioner in Bengal as Assistant Commissioner and Commissioner of the London Metropolitan Police, and afterwards as a Missionary in Darjeeling was in some respects unique His note is one of the most powerful papers in the whole series. The opinion of Mr (now Sir Robert) Carlyle, and the note of Mr. (now Sir Edward) Baker, the only executive officer who favours separation should also be closely studied From the other opinions I make a few quotations

Mr Forbes' view

Mr Forbes, Commissioner of Chhota Nagpur, says :—

"I gather from the remarks in the latter part of paragraph 12 of the memorial that the signatories are in favour of this cleavage being effected at as early a period as possible in each officer's service, under the idea that the chief desideratum in the training of a judicial officer is the acquisition of a thorough knowledge of the law of evidence and of 'the methods and rules which the long experience of English lawyers has dictated,' by close adherence to which he will in time become 'an expert specially educated and trained for the work of the Court' It is my humble experience that by far the most difficult part of a judicial officer's work in this country is not the mere acquisition of a knowledge of rules of procedure and of the law of evidence, but the actual ascertainment of the facts themselves The main consideration, to my mind, is the individual officer's ability to weigh the evidence of native witnesses, especially that class of evidence that is worked up by the police I think that an officer trained exclusively, from an early period of his service, 'for the work of the Court' on the lines suggested by the memorialists would in this matter contrast very unfavourably with one whose work during a great part of his service had not only brought him into daily contact with the people of the country outside the Courts, but had also given him a thorough insight into the working of the Police"

Mr. Oldham's opinion was equally uncompromising He writes :—

"The District officer's chief concern is with the people, and his chief connection with them in ordinary times, and apart from the collection of dues from them, is by the help of the Magistracy and the police, so far indissolubly connected that the control of both is held in the same hands There is no need to dilate on the fact that, in India, the control of the Magistracy is an essential for the proper control of the police."

Mr. C. E Buckland, Commissioner of the Presidency Division, has some practical remarks regarding the inner meaning of the movement of the separation He says.—

Mr Buckland's opinion

"It is unnecessary to recapitulate at length the arguments adduced on either side of the controversy by authorities of the greatest eminence, but if any reliance is to be placed on great names, it may, perhaps, be permitted to me to point out that on one side, that of the unionists, will be found ranged Lord Dalhousie, Lord Canning, Sir Frederick Halliday, Sir James Fitz-James Stephen, Sir Charles Elliott, on the other side, that of the separatists, Sir J P Grant, Sir Barnes Peacock and the gentlemen, chiefly lawyers, who have signed the memorial of the 7th July 1898, now under consideration, that is, on the one side, those who for the most part have been concerned with executive government, and, on the other, those who have chiefly devoted themselves to the administration of the law The line of cleavage is not absolute No stronger opinion has been given on the side of the unionists than that of Sir Fitz-James Stephen, the great law-giver and judge, on the side of the separatists appears the name of Mr Reynolds, well known in Bengal, but not as a judicial officer Regarded in its broadest aspects, the controversy appears to me to be the same as that which gave rise to such serious trouble in the earliest days of the Supreme Court, *viz*, whether India is to be governed by the lawyers or by the executive government, and, bearing this in mind, I feel confident that the further consideration of the question now under report can have but one result The separatists comprise (*a*) a number of English gentlemen, chiefly lawyers, (*b*) the National Indian Congress Party Their common object is obvious, namely, to reduce the power of the executive, and to do so by getting transferred to the Judiciary, culminating in the High Courts, much of the power, influence, and authority now vested in the District Officer as representing the Executive Government"

Objects of the separatists

"I submit that the object of many of the separatists is that described in the preceding paragraph, quite as much as any regard for theoretical perfection in the administration of justice and it is easy for those who have this political end in view to ally themselves with those who are genuinely interested in improving the system of judicial procedure But the Government of the country must be prepared to meet such attempts to undermine, by specious arguments, the executive power"

Mr W C Macpherson has some remarks on the difficulty of criminal administration in Bengal He writes:—

Mr W C Macpherson's opinion

"I do not think that I shall be digressing from the essentials of the arguments if I lay stress upon the difficulties of the administration of criminal justice in Bengal and upon the imperfection by which it is at present attended I will add that I am conscious that some of the facts which I am about to mention may be used in argument in favour of a distinct and highly-trained magisterial service, but that they appear to me also to make for the present in favour of concentration of powers in the interests of the public and the Government"

There are several other officers, Messrs Slacke, Savage, Faulder, and Marindin, whose opinions are more emphatic and most valuable in favour of the union, but as their arguments are the same, I will not trouble my Honourable Colleagues with them Another excellent contribution to the controversy is that of Mr Bolton It is written in a very moderate spirit, and analyses and refutes the examples given in Mr Man Mohan Ghose's memorandum. He quotes Mr Ghose's remarks "that justice was never better administered than at present," to which I have referred in the previous chapter. He also quotes the remarks of Lord Hobhouse that we have made the principle of judicial independence a living thing in India He goes on to make some significant remarks regarding the value to be attached to the cry for separation. He writes:—

Views of other officers

Mr Bolton's note

"In the presence of such testimony it cannot be seriously contended that suspicion, distrust, and discontent exist, and that cases of abuse at intervals render a change of system imperative The evidence of the National Congress and of the native press on this subject must be received with the greatest reserve The Congress is largely composed of, and entirely dominated by, the lawyers and the native press is mainly conducted by the same class, or by journalists bred in the towns who have little or no knowledge of the life of the interior, and are ordinarily too ready to accept statements of interested parties depreciatory of the administration In the struggle for existence imposed by the ever-increasing number, there is, I fear, with the majority of the legal practitioners a tendency to identify themselves personally with the causes of their clients to a degree which is opposed to the highest standard of professional conduct Keenly looking to every case as an advertisement favourable to the development of their practice and income they are disposed to resent with strong personal feeling any failure

of their advocacy due to the want of complaisance with their methods on the part of the Magistrates or unwillingness to accept their arguments and their law A weak Magistrate is the most acceptable to them, and as the present system tends to foster strength and independence of the Bar in the Magistiates, they dislike it The evidence of the lawyers is thus entitled to to small weight by reason of its interested character The journalists, on the other hand, have, as a body, no means of forming an independent opinion Besides these two classes, there are many, no doubt, in the towns who are ready to echo the condemnations of the present system by the National Congress, but they are disqualified from judging from personal ignorance of the working of the system I understand that the British Indian Association also have recently submitted a representation in favour of separation The Association has not in the present day the courage to face possible imputations of its lack of sympathy with the movements of the advanced sections of the community

"But the great mass of the people have found no representation in the present controversy To them it is essential that the District Officer should possess and be ready to exercise strongly and promptly, the power to protect them from injustice, oppression and crime They agitate themselves little if at all over the occasional irregularities of the officials of which the lawyers and journalists are disposed to make so much My long official experience has taught me that the most popular officer is he who while sympathetic and kindly to the people, is strong Such an officer—and not the weak and nervously pedantic and technical—can be depended upon to put down oppression, to repress crime, and to carry out reforms and improvements, and the people are generously prepared to overlook irregularities on his part due to idiosyncracies of character or excess of zeal It is remarked when the cases numbered XVII and XX in Mr Ghose's list occurred, that even the journalists were not disposed to press for severe notice of the conduct of the officer concerned, on learning that he had won great popularity through his kindness and generosity The suspicion, distrust and discontent which the present system is alleged to create does not exist in fact, save among a limited class consisting of interested or ignorant men"

"The memorial further argues that it is no longer possible to content ourselves with a patriarchal system which relies on the good sense, education, integrity, and the quick apprehension of the just and equitable of our English Magistrates, but that, in view of requirements of the English method of trial introduced in India, it is essential to the proper, efficient, and impartial administration of justice, that the judicial officer should be an expert specially educated and trained for the work of the Courts It is obviously implied that lawyers should be appointed to the Courts, and a request is thus made for a modification of the system of selecting the officers which only adds to the objections to the separation of judicial from executive functions, for the rest, the argument of the memorial may be described as resting on two fallacies It is neither true that the patriarchal system survives, except in the very few backward districts, nor that special legal education and training are essential in the administration of criminal justice in the districts of India The Magistrates do not dispose of the work in the patriarchal method of old, but are bound to observe, and are not permitted by the Superior Courts to depart from, the procedure and rules of evidence laid by the law Outside of the legal profession few, if any, of those best acquainted with the working of the Courts in the interior would be found to recommend the substitution of lawyers for the present class of Magistrates It is a commonly expressed belief in the districts that there is already too much law, and that justice is too often sacrificed to technicality, and it is felt that the presence of lawyers on the Bench would increase, rather than diminish, the evil The present system is approved because it officers the Courts with men possessed of practical administrative experience and knowledge of the country, and bringing to bear on their work common-sense combined with a strong spirit of justice The expert qualification needed is sufficiently secured by the examinations in law to which the officers are subjected before and after their admission into the services, and by the practical training derived from the exercise of judicial powers."

Mr E Macnaghten's view

Another opinion to which I briefly refer is that of Mr E Macnaghten, General Secretary of the Bihar Indigo Planters' Association As it is very brief, I reproduce it here:—

"I must premise that my experience has been gained entirely in the four districts of North Bihar where, for the last 37 years, I have been in constant touch with both Europeans and natives In the Bengal mofassal at any rate there is no such thing as public opinion on matters of administration Local self-government is a farce, it is not understood by the people, and only those who expect to reap some benefit are willing to accept office

"I agree with the views expressed by Sir Charles Elliott in his article printed in the Asiatic Quarterly Review for October 1896, in his extract from Sir John Strachy's "India," page 287, which is repeated in the last paragraph of the memorandum prepared under the orders of the Bengal Government, and in the quotation from Sir Fitz-James Stephen's minutes on the administration of justice in British India, page 11, paragraph 24, of the same memorandum.

"The Legislation of 1861, the outcome of the proceedings of the Commission in 1860, for the improvement of the police, has worked smoothly. I cannot call to my mind any case of unnecessary interference on the part of a District Officer I am of opinion that in his own district that officer should be the paramount authority, that he should move about as much

as possible, and supervise, to a much greater extent than is now done, the work of his subordinates The talk of interference with judicial independence is nonsense Subordinate officers should be encouraged to go to their superiors for advice and assistance in any difficulty It is better that they should do this, and avoid a mistake, than to commit one and receive a formal rebuke after an interval of months There is, I believe, now a tendency to reduce the enormous amount of office work, reports, etc, which is demanded from a District Officer, but until further steps are taken in this direction his movements cannot be as free as they should be Instead of in any way curtailing the authority of the District Officer I would advocate the abolition of all reports and returns not absolutely necessary, so as to allow of his making a more living reality of himself to the people of his district It is impossible to exaggerate the influence for good that can be exercised by capable officers I could name many such, and though I have known men who did not approach the same standard, their integrity of purpose has never been questioned Holding the views I have attempted to express, the financial side of the question is not of primary importance, but taking as examples the districts of North Bihar, we find two judges for four districts It is difficult to see how Mr Dutt's scheme would work satisfactorily here without considerable expenditure I do not think that any change in the existing system is called for It would be most unwise, if not dangerous, to carry it out on the lines proposed in the memorial, and reform should take the shape of enhancing the authority of the District Officer, reducing the amount of routine office work, and encouraging a more intimate acquaintance with the district and its people"

Sir Edward Baker's opinion when a Secretary to the Government of Bengal

In the appendices will be found the full text of the note written by Sir Edward Baker when a Secretary to the Government of Bengal As Sir Edward Baker's view was subsequently allowed to prevail, when the matter came before the Council eight years afterwards, his note demands most careful attention, though for my own part I cannot conceive why this personal opinion should be considered more weighty, more reliable than that of hundreds of other officers including many Governors, Lieutenant-Governors, Chief Commissioners and High Court Judges, who hold the contrary view. He discards the objection to District Magistrates trying cases —

"It seems, therefore, that the evil which is theoretically possible from the direct use of the District Magistrate's judicial powers is practically extinct, and has no present or recent existence"

It is on his paragraphs 5 and 6 that he bases his whole case I give these paragraphs below because they are very important.—

"This, however, cannot be said of the second form which the evil due to the combination of functions assumes This arises from the control which the District Magistrate is empowered to exercise, and does daily exercise, over the subordinate Magistrates, by whom the great bulk of criminal cases are tried. The exercise of this control is the crucial point of the objections to the existing system It is a necessary* part of the District Magistrate's duty to distribute the cases arising in his district among his various subordinates for trial, and to withdraw and transfer cases for cause shown It is also a necessary part of his duty to watch the manner in which the cases are conducted by them, and to report on their qualifications to Government, thus largely affecting their promotion and prospects It is also a part of his duty to supervise their proceedings (as well as merely to watch them), and to assist them by advice and admonition, in the manner described by Sir Charles Elliott in the 3rd paragraph of page 26 of his article above referred to

* Not at all necessary if there is a territorial distribution of work

R H C

"The exercise of these powers not merely gives an injudicious District Magistrate the opportunity of directly interfering with the conduct of cases, but also indirectly affects the judicial action of the subordinate magistrates If the former were the only result, it might possibly be checked by the intervention of the High Court and the executive Government, though the recorded cases quoted by Mr Man Mohan Ghose and others that might be quoted show that these safeguards are not always effectual But the indirect and only partly conscious effects of the power of control are vastly more insidious, far-reaching, and important It is right—it is in my judgment essential—that the work of the subordinate Magistrate should be subject to regular, constant and systematic control, for they cannot be relied on more than any other class of subordinate officials, to do their work diligently, accurately, and intelligently without it But if the control is exercised by the officer who is responsible for the peace of the district, and if his opinion can make or mar their future prospects, there is the constant danger that in doing so he will not be exclusively guided by judicial considerations That the District Magistrate will not consciously permit extraneous considerations to enter his mind may be admitted but it is placing too great a strain on human nature to expect any man to exclude them effectually and always The subordinate Magistrates, alive to the importance to them of their superior's favourable judgment, unconsciously adapt themselves to his unconscious bias. I fully believe that they very seldom wittingly do an injustice, but the inevitable result is that criminal trials are not conducted in the atmosphere of cool impartiality which should pervade a Court of Justice"

As I shall shew in my recommendations in the last chapter some of these objectionable features to which Sir E Baker refers are not a necessary concomitant of the present system, and I firmly disclaim and deny the truth of this last sentence ("the inevitable result is that criminal trials are not conducted in the atmosphere of cool impartiality which should pervade a Court of Justice" This simple assertion, based on *a priori* grounds and not on actual facts, was afterwards adopted by Sir Harvey Adamson as the basis of his case when he made the statement in Council in 1908 Its correctness is entirely repudiated by Sir Henry Prinsep Sir Edward Baker has merely adopted the cry of the Bar Library I certainly cannot accept the *ipse dixit* of Sir Edward Baker, the greater part of whose service was confined to Calcutta, and its environs

I would next draw attention to paragraph 11 of his note in which he lays great stress on the danger of allowing the power, influence and authority of the District Magistrate to be weakened.

"I desire to subscribe entirely to the dictum of Sir Fitz-James Stephen that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in the influence and authority over the natives would be dearly purchased even by an improvement in the administration of justice"

After describing the arguments to the contrary in the memorial as "singularly feeble and fallacious" he adds—

"Holding as I do that some reform is both expedient and practicable, I accept it as an assured condition that it should be so framed as to leave unimpaired the power, influence and authority of the District Magistrate, or if possible even to strengthen them further"

Later on in paragraph 17 he himself states the danger that exist and promises that his scheme will include a safeguard; but I fail to see any such safeguard in his scheme

The danger is shown by him as follows :—

"The other point to which I may briefly allude arises out of the marked difference between civil suits and criminal cases In the former the matter at issue is merely one between man and man, the decision of a Subordinate Civil Court has no effect beyond the immediate parties in it, and the native Judge or Munsiff approaches it with no bias either way. In criminal cases however that is not so The objection of national temperament and the curious but undoubted weakness of the sense of public rights which is characteristic of Bengalis, the native Subordinate Magistrate is almost always subject to unconscious bias in favour of the accused The bias needs correction which is at present applied by the District Magistrate This objection also is valid, and I propose to safeguard against it in the manner indicated below I admit that the correction is necessary, and also that it cannot be effectively applied by our appellate Court"

In both these paragraphs (11 and 17) the whole case for separation has been given away Are Criminal Courts presided over by Magistrates with a bias in favour of the accused "conducted in an atmosphere of cool impartiality?" Have society and the public no rights? But what is his safeguard and corrective of bias? That the District Judge (who will in most cases be a Deputy Magistrate) should make long and minute inspections of the Court, and submit his inspection notes through the District Officer and the Commissioner! This very safeguard of his was thrown away when the Council afterwards adopted Sir Edward Baker's theories, but as a safeguard it was utterly futile If the District Judge or the new Chief Magistrate under the separation scheme does not carry out his inspection, who is to take action? And if the District Officer or Commissioner were to comment unfavourably on his inspection notes when they were sent in what would happen? Would it not be the executive attacking the judicial? I next draw attention to paragraph 18 The whole object of the scheme now becomes manifest, we must do something to allay agitation, and we are asked to overturn our system of criminal administration, built up after years of experience, at the dictation of the Congress backed up by a few English lawyers who know nothing of the mofussil! It is policy not conviction which is at the bottom of the whole scheme, and it was a similar subordination of conviction to policy which afterwards played so great a part in lowering the prestige of the administration of Bengal in the eyes of the whole of India

Safeguards proposed to maintain District Magistrate's authority

Policy not conviction the basis of the case for separation

With the single exception of Sir Edward Baker, the whole of the Bengal officers, as well those judges of the High Court whose knowledge and experience

extended beyond Calcutta, were not in favour of any separation One after another they knock the bottom out of Mr Man Mohan Ghose's arguments, and show that the whole cry was inspired by a desire to weaken the authority of Government

29. *Madras.*—The last of the local Government's letter to be considered is that of Madras It is one of the most interesting in the whole series. It is expressed with singular felicity of language and studied moderation One of the most interesting features about it is the experience gained by the Madras Government in the separation of functions when Tahsildars ceased to exercise criminal powers and those powers were entrusted to stationary Magistrates The same divorcing of the Tahsildars from magisterial work has led to a weakening of the authority to cope with the forces of disorder. If these things happened when the District Magistrates and the sub-divisional and all first class Magistrates were still executive officers, what would happen if the separation went up further, and the only check over a stationary Magistrate was a stationary Judge who paid angel's visits, did no camping out, and was entirely unacquainted with the district I find nothing more instructive in the papers than paragraphs 10 to 18 of the Madras letter, and I recommend these paragraphs to the careful attention of my Hon'ble Colleagues In clear language they have explained the ground for the faith that is in them, and they show conclusively that the picture of what would happen if the separation were effected is no imaginary one. In paragraph 18 they go on to explain why it is that practising lawyers and Judges with no experience of mofussil conditions do and must take the contrary view —

Views of Madras Government

Results of depriving Tahsildars of magisterial powers

"That the High Courts themselves with all their dependent judiciary and legal paraphernalia, the revenue of the country, and even the maintenance of British rule itself depend upon the constant exertions, supervision, and control of a scanty body of civil officers, who are scattered throughout a great country, and who to perform their varied duties with efficiency must be vested with varied powers, is probably realised neither by judges or ex-judges of the High Courts, nor by anyone else who is not in touch with the actual executive Government of the country"

I ask, do the judges who sit on the Bench to pass decrees for the transfer of large estates and the attachment of property ever stop to reflect that they would be wholly impotent to get their decrees executed if it were not for a strong executive that maintains order and peace throughout the length and breadth of the land? Are the judges so slow to punish contempt of their own authority that they can afford, while sitting at ease on the Bench, to be censorious to executive officers honestly trying to do their duty, and can impugn the motives and weaken the authority of the men on whom it depends to put down oppression and tyranny The first sign of general disorder would be the forcible reversal of half of the civil court decrees throughout the country Who would care for the decrees of a judge if the executive did not command the obedience of the lawless?

Next come the notes of the Judges of the Madras High Court The Chief Justice, and Justices Shephard, Davies, and Boddam favour separation on general grounds, while Justices Benson and Moore take the contrary view based on their long experience Only one case of abuse is unearthed Sir Ralph Benson (who has more than once acted as Chief Justice and is now the father of the Madras Civil Service) ends his conclusion in favour of the maintenance of the present system with the following remarks.—

Views of the Madras High Court.

Sir Ralph Benson's view.

"It is possible that the system of Stationary Sub-Magistrates which has been introduced into this Presidency, and which has been already referred to, might with advantage be extended, but its merits are still on trial, and recent experience in the Tinnevelly and Madura districts, in reference to the anti-Shanar and anti-Kallar riots, rather leads to the conclusion that the stationariness of these Magistrates and their divorce from all concern with the general administration of the districts had left them in ignorance of many things which under the former system, they would have known, and thus deprived the superior Magistrates of that timely pre-knowledge of the feelings of the populace which would have enabled them to prevent these murderous riots, or, at least, to minimise their worst features."

Stationary Sub-Magistrates

The only other opinions out of many which I include in the appendices to this chapter are those of Sir James Thomson, and of Mr Le Fanu of the Board of Revenue Sir James Thomson's note is a terse and forcible statement of the case Mr Le Fanu's note is a most amusing one, and my Hon'ble Colleagues will appreciate some lightening of the dullness of so tedious a case

Summary of provincial opinions

30 To sum up, every local Government has pronounced with no uncertain voice against the separation Officer after officer has torn Mr Man Mohan Ghose's momorandum into shreds, all executive officers of experience have condemned the proposals in the memorial Of the Judges of the High Courts, Chief Courts, and Judicial Commissioners' Courts, those who have had some experience of district administration have pronounced against a change In favour of separation are those Judges who support it in theory, most of whom cannot quote a single case of abuse arising under the present system The only executive officer of high status, besides Sir Henry Cotton, is Sir Edward Baker, and he advocates some form of separation lest other and worse evils should be forced upon us by public opinion in England. Even he is unable to say that the practical evil is serious or is increasing

Among those Judicial officers who have no experience of District administration, we find Sir Lawrence Jenkins who considers that the position of District Magistrates should not be altered, but that separation might be confined to subordinate Magistrates, and Sir F Maclean who concedes that the case was one for the Statesmen rather than for the Judge, and that if those responsible for the government declared that the change was impossible or impracticable, there was an end of the matter. Sir Arthur Strachey, Chief Justice of the Allahabad High Court, unhesitatingly supported the existing system

Among the strongest opponents of separation were Sir Harvey Adamson and Sir John Jenkins, the Governors of Bombay and Madras, Sir Antony (now Lord) MacDonnell, and Sir John Woodburn Does no significance attach to the fact that those who know the difficulties of district administration invariably support the present system, and only those see objections to it who are unacquainted with district administration ?

CHAPTER V

The stage reached in Lord Curzon's time

Examination of the Provincial replies by Sir John Hewett and Sir Denzil Ibbetson

30. The replies of the local Governments and High Courts to the reference of the Government of India described in the last chapter are exhaustively examined by Sir John Hewett, then Secretary in the Home Department, and Sir Denzil Ibbetson, then Home and Revenue Member, who appended to his note the note by Sir T Raleigh, to which I have already referred.

I do not think that any of us in the Government of India who are called upon to decide so momentous a question of policy as that which forms the subject of this Note should omit to read these three notes which I attach *in extenso* as the appendices to this chapter The distinguished careers, and administrative abilities of the two former officers entitle their views to a most attentive consideration, while a perusal of Sir Thomas Raleigh's notes, after he had studied the question, with his *á priori* views before he had studied them affords an admirable example of the effect of knowledge, impartially examined on modifying the judgment of a totally unprejudiced man.

The various quotations from the opinions given by these various officers will assist my Hon'ble Colleagues still further in appreciating the evidence tendered in this case The quotations that I have made in my present Note were made independently and without reference to those made by Sir John Hewett or Sir Denzil Ibbetson I do not attempt to add to the labour of my Colleagues in reading this book by attempting to analyse or abstract these notes. They stand by themselves, each in the language characteristic of the man I would however draw special attention to paragraphs 13 to 15 of Sir John Hewett's Note, and to paragraphs 76 to 83 of Sir Denzil Ibbetson's Note

Question pigeonholed by Lord Curzon

These papers remained with Lord Curzon from 1903 to the date of his resignation Sir Thomas Raleigh's note was submitted in 1905; but Lord Curzon was never able to deal with them In March 1906 Sir Herbert Risley took Lord Minto's orders to put up the case at Simla

CHAPTER VI.

The revival of the question by Lord Minto's Government

31 Even after Lord Curzon's departure the file lay *perdu* for some time longer, but Sir A Arundel recorded a note for the benefit of his successor, dated the 18th September 1906, from which I quote the following —

"I may say here that I venture to dissent *in toto* from the argument of the Hon'ble Mr Baker embodied in his note, dated 6th June 1906, on the judicial training of Civilians, that we should assent to the severance of Judicial and Executive functions because whether this can or cannot be done, not only without danger but with positive advantage to the interests of Government, as he believes it can, *it is quite certain to be forced upon us* (The italics are his)

"I think that the adoption of such a course for such a reason would be a regrettable abdication of duty, and that if we believe it to be dangerous to the public safety we are bound as a Government to resist it to the last"

He was opposed to separation though he had suggestions to make which tended to remove any trace of want of independence which may be attendant on them.

Enquiry of local Governments as to extent of separation already effected by natural development

32 In 1907 the Government of India on the receipt of a reminder from the Secretary of State asked all the local Governments to submit information as to the extent to which separation of Judicial and Executive functions had already been effected by natural development Only facts were required and no arguments or opinion were invited But the next development of the question cannot but be described as surprising Before the information asked for had been received, the Home Member Sir Harvey Adamson executed a complete 'volte face' on the attitude hitherto adopted by the Government of India and in direct contradiction of his own strongest opposition to separation before he came to the Government of India. He made a small attempt at consistency by excluding Burma as a place where people are accustomed to obey orders, but with a delicious inconsistency he spoke about complacent Commissioners and Collectors elsewhere supporting the existing system Yet surely the place where the people are accustomed to obey orders is a better place for relaxing executive control than the place where the people are not accustomed to obey orders. Having therefore pronounced that this particular reform was unnecessary in Burma which he did know, he proceeds to assume that it is required in India which he did not know He protests his ignorance of Bengal but confines his study of the question to the Bengal opinions. He is content to glance cursorily at the notes in the rest of the volume and passes by the strong consensus of opinion in favour of the existing system though this will, he says, have to be dealt with in the despatch to the Secretary of State But he concerns himself only with the faults of the system Having picked out the faults of the existing system, namely, the combination of magisterial and police functions and having stated to his own satisfaction on the evidence of Sir Herbert Risley and Sir Edward Baker that everything is wrong in Bengal and the combination leads there to evils which are not felt elsewhere, Sir Harvey Adamson proceeds to propound his own scheme of separation by which he would make the District Superintendent of Police solely responsible for law and order In the course of explaining his scheme he particularly emphasises the fact that preventive action must not remain with the District Officers but with the separated Magistrates He states his opinion as follows :—

Sir Harvey Adamson's *volte face*

His scheme of separation

Preventive powers to be retained by Magistrates

"I shudder to contemplate the results that would arise if the magistracy were separated from the district officer, and the district officer with the police under him retained all powers under the preventive sections Whenever friction arose the man who was acquitted by the magistrate would be arrested by the police and committed to jail by the district officer under a charge of bad livelihood The scandals that would ensue would be intolerable I am quite convinced that if the district officer is to be separated from the magistracy, the judicial powers under the preventive sections must remain with the magistracy, and with the magistracy alone."

Yet we find that that which Sir Harvey Adamson shuddered to contemplate and that which he was convinced was impossible and would lead to intolerable abuses, is the very scheme which he shortly afterwards heartily accepted and even fathered! What weight and stability can be attached to recommendations like these! Having thrown away the convictions of a lifetime so forcibly set out in his opinion as Commissioner of the Mandalay Division, he sets out to make a popular concession and tries to salve his conscience first by ruling out Burma and secondly by pleading entire ignorance of Bengal No wonder that he vacillates so much and has to resort to special pleading to prop up his faltering edifice and quiet his own uneasy qualms What would be thought of a Commission which began by brushing aside without examination all the evidence that it had recorded, and proceeded to state the alleged defects of the system under enquiry regardless of any consideration whether the evidence recorded refuted those defects, and regardless of the evidence affirming the dangers of altering the system! And yet this is exactly what Sir H Adamson did The real truth is that he subordinated his better judgment to the influence of Sir Herbert Risley, Sir Edward Baker, the editor of the *Amrita Bazar Patrika*, the Maharaja of Darbhanga and Mr Gokhale Sir Herbert Risley was a man of brilliant parts as a writer, a scholar, and ethnographer, but who would venture to cite him as a supreme authority on district administration? Sir Edward Baker's service was almost wholly confined to Calcutta, Howrah and Alipore As for the others, does a powerful zamindar in Bengal like a strong District Magistrate? Certainly not A strong magistrate is the friend of the poor and oppressed Are we to break up our system at the bidding of a Bengali editor because powerful persons wish to be freed from the control of the district administration in Bengal? Doubtless these persons were very moderate in their views but could not Sir Harvey Adamson see through all that? My Hon'ble Colleagues may recall the debate in Council on the motion to give the Collector an Advisory Council Mr Gokhale's original speech was studied in its moderation, it was merely to give advice and help to the Collector that the Council would be used On the other hand in his reply, when he was nettled at my exposure of the impracticability of his proposals, and my question as to what would be the end of his councils, he unmasked his batteries and in a voice quivering with anger twice repeated "*what we want is to get the administration more and more into our hands until it is all our own*" It is behind a great show of moderation expressed in silky language that the Mahratta Brahmins hide their real objective That objective is not very difficult to discern. They look for the time when Magistrates and Judges will all be recruited from the ranks of the Indian Bar, and when the actions of the executive officers of Government will be paralysed and discredited What is to me most astonishing in the notes which follow is that both Sir Herbert Risley and Sir Harvey Adamson make remarks in them which are the best answers to the scheme which they recommend although they appear to be sublimely unconscious of the fact. The following extract is taken from Sir Herbert Risley's note:—

Sir Harvey Adamson's scheme simply a sop to Cerberus

Objections to separation in Sir Harvey Adamson's and Sir Herbert Risley's own notes

"Bengali litigants as a class have little or no sense of the distinction between words and facts, they live in an atmosphere of intrigue within the family, within the village and within the caste, they revel in litigation for its own sake and they use the Courts for the gratification of every form of private enmity

The average young Englishman who is set down to try criminal cases in a muffasil Court, wants above all things to do justice, and is constantly trying to go behind the tangle of false evidence to get at the real facts In doing this he often does violence to the law, and his legal shortcomings lead to reflections both upon his efficiency and upon his sense of justice One of the Judges of the Calcutta High Court said to me last cold weather that most of his time in the Criminal Bench was taken up in saving decisions which were right in substance but wrong in form The question as to what should be done with a manifestly true case which is supported by manifestly false evidence is one of frequent occurrence in Courts in Bengal and different men will deal with it differently according to their temperament Again the prosecution is almost always weaker than the defence An untrained Court inspector is pitted against an experienced pleader and the Magistrate who is trying the case has to take a more active part in prosecuting than is compatible with an entirely judicial frame of mind' These are some of the abuses which account for the prejudice against English Magistrates in the Bengal muffasil"

This argument is to me wonderful The Bengal atmosphere is so much like England that in Bengal of all places we must do something to approximate English methods ! The difficulty of unravelling truth from falsehood is so great that we must employ Magistrates who do not know and move about the people in preference to those who do know and move about them ! The prosecution is so much weaker than the defence that we must remove from the Bench those who try to get behind the tangle of false evidence and get at the real facts of the case and supply their places by lawyers pure and simple ! How did a man of such attainments come to put his pen to such a farrago of inconsistency ? Surely the remedy lies in the better judicial training of all our officers and the better representation of the prosecution in our courts The dam of our reservoir is weak and may burst, but instead of mending and strengthening the dam Sir Herbert Risley would remove all dangers of a breach by letting the water out of it altogether There are points in our system which are weak and need repair and improvement, but rather than mend them the system is to be demolished and the only barrier that the administration of our criminal justice possesses is to be broken down So much for the English Magistrates in whom, contrary to all experience of witnesses who are more practical men, Sir Herbert Risley believes the people have no confidence No confidence, forsooth ! To whom do they come in their troubles ? By whose Courts do they ask that their cases may be tried ? Now let me turn to Sir Herbert Risley's description of Deputy Magistrates He writes :—

Sir Herbert Risley on the Deputy Magistrate in Bengal

"The shortcomings of Bengali Deputy Magistrates are more numerous and more conspicuous They are bad at facts and weak in law, they shirk responsibility, they work for returns and are always thinking of the appellate court, they will do anything to get rid of a difficult case for the time being—adjourn with a crowd of witnesses unheard, refer to the police for further investigation, promise a local enquiry, etc, all in the hope that something will turn up to relieve them of the necessity of making up their mind They are afraid to acquit because of the District Magistrate, they are afraid to convict because of the Sessions Judge And the burden of having executive work to do presses upon them very severely Put all these things together and it is not very surprising that the courts are not trusted"

What a picture ! Here are the people from whom all responsibility for the maintenance of law and order is to be withdrawn They will now always be able to acquit without hesitation as the surest road to the disposal of a case, and they are now to be subject to less inspection and control The inspection work will be less frequent Witness Mr Justice Stevens' analysis of inspection by Sessions Judges of Civil Courts, and his pronouncement that if Sir Harvey Adamson's and Sir Herbert Risley's scheme were ever to receive its full effect the officer to supervise them would most often be one of their promoted selves I must again invite attention to Sir Edward Baker's remarks quoted in chapter IV.

"And by reason of natural temperament and the curious but undoubted weakness of a sense of public rights, which is characteristic of the Bengalis, a native subordinate Magistrate is almost always subject to an unconscious bias in favour of the accused"

Case before Council

33 It was by Sir Harvey Adamson, Sir Edward Baker and Sir Herbert Risley, one officer whose experience was limited to Burma, and two officers whose outlook was largely coloured by Calcutta influences, that the case was put before the Council

Mr Finlay's note
Lord Kitchener's note.

Mr Finlay did not agree at all, but wrote a somewhat flabby note saying that he would not oppose. Lord Kitchener advocated separation strongly but on entirely different lines He expressed extreme views about the incompetency of the Civil Service as Judicial officers regarding which he necessarily had no personal knowledge, citing as one example the confiscation by the Chief Presidency Magistrate, Calcutta, of a press for printing sedition He wrote :—

"I would now go a step further in stating my conviction that if justice in India is not administered by Englishmen, but is allowed to depend mainly on Native Judges and Magistrates, our rule in this respect is after all founded on sand We have had an example lately of a Native High Court Judge, on the Bench, in an important case, playing to the gallery, and toying with seditious terms as well as the continuity of our established rule in this country

Such an exhibition at the present moment, when feelings of unrest and political agitation run high, more specially in the district where the Judge in question gave utterance to his objectionable remarks show us what support we may expect from justice if we allow the Bench to be monopolised by the native element"

Lord Kitchener's remedy was to have a separate Judicial service recruited from England, with men specially trained in law Lord Kitchener was entirely at cross purposes with the advocates of the scheme They were apparently in favour of measures which would reduce the control over the native Magistrate and increase the number of cases tried by that agency Lord Kitchener, on the other hand, wanted to substitute European Magistrates and European Judges as far as possible for the trial of criminal cases

Lord Kitchener's remedy

General Scott refused to be charmed with the views of the trio in favour of separation but was attracted by the views of Sir Antony Macdonnell, Sir Denzil Ibbetson and Sir John Hewett

General Scott's view

Sir John Miller's note is characteristic Though I have a great respect for Sir John Miller as a friend and a man, yet I have less confidence in him as an administrator His orders as Chief Commissioner of the Central Provinces were often on the principle "*Video meliora proboque, deteriora sequor.*" Half his note reads in favour of separation, half of it points out the dangers of separation In one paragraph 4 he supports the necessity of guarding against these dangers by modelling our criminal administration on the French system Between all these conflicting views of one thing I feel sure, that had the sole responsibility rested on Sir John Miller of introducing the change in the provinces he knew, the United Provinces and the Central Provinces, he would have drifted along with a policy of *laissez faire.*

Sir John Miller's note

Sir Erle Richards was of course unable to criticise the details His note is well worth reading He had no practical experience of India On the memorial alone he would have thrown out the proposals, and he quotes Sir Thomas Raleigh's experience and his exposure of Man Mohan Ghose's "horrid examples," remarking that these cases have been analysed by Sir T Raleigh and his notes dispose of them completely

Sir Erle Richards' opinion

"Even if these cases did prove the allegations in the memorial, I should not say that they were sufficient of themselves to make out a case for general reform I am only surprised that there are not more mistakes made in the conduct of criminal business in this country Magistrates, whether independent or not, are many of them comparatively inexperienced while High Courts and lawyers generally in India take a much more technical view of law than is common in England"

He then goes on to adopt the view of Sir Edward Baker Since the submission of the memorial, he thinks that further evidence has been furnished that the union is regarded as a grievance in Bengal, and that to conciliate public opinion in Bengal and also to conciliate that public in England, which takes an interest in India without understanding it, he considers, some step should be taken in the direction indicated His words are:—

"I am of opinion that some change should be made in this direction *if it can be done without weakening the executive*" (The italics are mine)

In his last paragraph he says:—

"One point more remains The lawyers of Bengal undoubtedly anticipate that any change such as is proposed will result in an increase in the number of Indians appointed to the Bench I am advised that this is not likely to be the effect of the particular reform under consideration, but it is a matter on which I think we should be the better for some definite information In point of legal attainments there is nothing to be said against Indian Magistrates and much to be said in their favour, but if the Criminal Bench were manned exclusively or even mainly by Indians the executive authority might be gravely weakened in time of stress The pressure that can be brought to bear upon Indian Magistrates by the Press and by political parties is very great, and, without suggesting illustrations within our own knowledge we can all imagine how the action of the Executive might be paralysed by timid Judges As Sir Alfred Lyall had said, Indian Judges are more likely to be influenced by any popular or political movement and are more prone to take up in regard to Executive authority an attitude that may under certain circumstances be highly inconvenient"

Sir Edward Baker naturally favoured the scheme which owed its initiation to him however modified by Sir Harvey Adamson and Sir Herbert Risley, and, to quiet the qualms of Lord Kitchener and Sir Erle Richards said that the new District Magistrate, distinct from the Collector, to be created under the scheme, would be generally of the Indian Civil Service though he might occasionally be a Deputy Magistrate of experience and judgment

Sir Edward Baker on this proposal

Credat Judaeus Apella! Did Sir Edward Baker really believe that he would be able to increase the ranks of the Civil Service over India by fifty per cent—25 per cent of the new District Magistrates and another 25 per cent to provide officers in training for the new Judicial appointments? Even he could not agree to the suggestion that the transfer and promotion of the new Judicial officers should be handed over to the High Court

"The High Courts should no doubt be consulted freely in all such matters (as they are now in regard to civil Judicial officers), but to hand over transfers and promotion formally to the Court would go too far in the direction of setting up two independent Governments in the same province I trust that nothing of the kind will be hinted at in the letter to the local Governments"

Lord Minto made no remarks on the case at this stage and when the file returned to him Sir Harvey Adamson noted that there was agreement as to a reference being made to local Governments and to any experiments that might be decided upon being first introduced in Bengal and Eastern Bengal He then proceeds to make the following observations with reference to the remarks of his colleagues

Sir Harvey Adamson's note

"The difficulty in which Magistrates are placed is well stated by the Hon'ble Mr Richards when he says that High Courts and lawyers in India take a much more technical view of the law than is common in England"

He alludes to the absence of technicalities in the Courts of Metropolitan Magistrates in England, half of whose proceedings would be reversed or returned if they came before a Court like Calcutta Then he goes on to say—

"This brings me to the Hon'ble Mr Finlay's note The protection of the innocent is a laudable object, but in India it has been overdone Mr Morley has recently alluded to the soulless efficiency of our administration Regarded from the point of view of the protection of the innocent, the criminal administration of Magistrates in India has reached the stage of soulless efficiency In every case that interests the Indian public the condemnation of the guilty is blocked by delays and technicalities First an adjournment is asked in order that the High Court may be moved to grant a transfer The Magistrate is bound by law to give it This gives time for tampering with the prosecution witnesses Then the case is tried, and if it goes safely through appeal, there is always some technical ground on which it can be brought into the High Court on revision, and when it comes into the High Court there is splitting of legal hairs and very little attention to common sense and broad justice Under these circumstances when our Magistrates fail to be a terror to the guilty, as they often do, it may be due less to their faults than to the faults of the system It is a question whether, now that decentralization is in the air, we should not proceed to decentralize our criminal system and to provide in language that cannot be evaded that no sentence of a Criminal Court is to be set aside in revision unless it is perfectly clear on the broadest lines that there has been a failure of justice"

It is certainly difficult not to smile Every one of the notes recorded in favour of the change contains powerful reasons why the change should *not* be made and finally the Home Member sums up his case by describing how under the existing state a system of soulless efficiency has been reached in which the protection of the innocent is carried too far and technicalities outweigh broad justice What then has become of the executive bias, the want of an impartial atmosphere, the feeling that Criminal Courts are prejudiced and that the accused is not given a fair trial? Can any one in the name of common sense deduce from these discussions that if the separation of executive and magisterial work were to be steadily carried out, the Magistrates who would take their places would be less technical and that the protection of the innocents will no longer be overdone? If you read for "a soulless efficiency for the protection of the innocent," "a soulless indifference to the escape of the guilty" the absurdity of the statement which I have just quoted lending any support to the case of separation becomes apparent

An Order in Council was passed on the 14th February 1908, approving a more complete separation of judicial and executive functions in India, and adding that the scheme of separation sketched out by Sir Harvey Adamson should be referred to Bengal and Eastern Bengal and Assam and those two local Governments should be asked to report on the advisability of introducing it in selected districts with an estimate of the cost A draft to the two local Governments was accordingly put up upon which Sir Harvey Adamson recorded the following note which has, I confess, its humourous side

A reference to local Governments ordered in Council.

Sir Harvey Adamson's note on the draft reference

"At first I was inclined to think that the draft required considerable expansion chiefly with the object of convincing local Governments that the present system is defective, and that the proposed system will in no way impair the prestige of the head of the district, but will in fact enhance it But on second thoughts, it seems to me that this can be better done in a Budget speech It is desirable that the scheme should be subjected to public criticism I am in a way obliged to make a Budget speech, and I have been searching in vain for a suitable subject The separation of functions will suit admirably"

Sir Harvey Adamson was indeed wise to have abstained from attempting the impossible task of convincing local Governments that their unanimous opposition to the scheme was all a mistake, and that the weighty and well-considered reasons and arguments adduced by them were all bunkum and foolishness So he took the easy alternative of doing his convincing by a speech in Council which none of the Government officers present could answer, and which however much he might afterwards repudiate it could not but seriously embarrass the Government in dealing with a subject of the greatest moment This important question was in fact butchered to make stuff for the Home Member's oratory. The speech was made and has ever since been regarded as a declaration of the deliberate decision of the Government of India in favour of separation

Sir H Adamson's Budget speech

It is true that the actual measure proposed was only tentative and suggestive, but it is impossible to whittle away the significance of the following admission in his budget speech—

"On these grounds the Government of India have decided to advance cautiously and tentatively towards the separation of Judicial and Executive functions in those parts of India where the local conditions render that change possible and appropriate The experiment may be a costly one, but we think that the object is worthy"

He gives reasons for thinking Bengal to be the province in which the change should be made and goes on to say—

"These may or may not be the real causes, but most certainly the general belief is that the defects of a joinder of functions are most prominent in the Bengals, and it is on those grounds we have come to the conclusion that a start should be made in those two provinces"

In his speech he also committed the Government of India to the following statement :—

The inevitable result of the present system is that criminal trials, affecting the general peace of the district, are not always conducted in the atmosphere of cool impartiality which should pervade a court of justice"

By what authority did he thus libel the Magistracy of India? The remarks are taken bodily from Sir Edward Baker's note written eight years previously He did not even limit his statement to Bengal, but his remarks were comments on India He speaks of the "soulless efficiency", of the protection of the innocent being overdone, and later on in his speech he admits that the people did not share those feelings of mistrust until their lawyers had put it into their minds to do so What a confession! Surely Sir Harvey Adamson was not so blind as not to see that this was simply a new version of the old saying "If you have a bad case abuse the plaintiff's attorney" or in the parlance of India "if you have a bad case impugn the impartiality of the Court" In India this course is particularly advantageous because it carries prejudice in the High Court in the minds of the Judges who have no experience of district administration and it obtains the sympathy of the lawyers for the cry of separation, which is ultimately expected to result in the Magistracy being more and more filled up from their own ranks

What happened next? The following telegram from the Secretary of State .—

Action of Secretary of State on report of speech

"Reuter reports in Budget debate statement Sir Harvey Adamson announced a scheme for separation of judicial and executive functions in Civil Service, Bengal and Eastern Bengal and Assam on the ground that he gave (*sic*) an outline of the measures proposed This surprises me extremely Surely there must be some mistake or inadvertence Question is one of first rate importance both in India and England and object of much attention in Parliament and was referred by my predecessor to your predecessor's Government for consideration and preparation of proposals which I have long been expecting I feel sure that your Government would not commit itself to any line of policy which has not received my previous approval in Council No doubt you will without delay submit the proposed measures for my examination Meantime I take it for granted that no official steps will be taken and no announcement of policy publicly made"

This might have been expected. The Secretary of State could hardly believe that this great controversy had been given away The despatch forwarding the memorial had never been replied to and only, in 1907, Mr Morley had forwarded certain questions and answers in Parliament, as a reminder on the subject. He had then said "I shall be glad to receive as soon as possible the conclusions of Your Excellency in Council on this important question which has now been for so many years before the Government of India" It is hardly surprising, therefore, that Mr. Morley took exception to Sir Harvey Adamson's speech. The reply sent was as follows.—

Reply to Secretary of State

"No final scheme of separation of Executive and Judicial functions has been formulated or announced We have been considering question in past year and formulated tentative scheme for application in selected parts of both Bengals Scheme has been referred to both Governments for consideration As we thought it desirable to have suggestions simultaneously subjected to public criticism Adamson with my concurrence in his Budget speech explained the reasons which led us to think that some advance should be made in separating functions and outlined suggested scheme stating that scheme was in no way final, only an attempt to obtain assistance in arriving at solution difficult problem We now propose to address you fully after receipt of local Governments' reports and public criticism as we are not yet in a position to put matured proposals before you and of course had never any intention of taking actual steps without your sanction Before submitting any final scheme we thought highly advisable to obtain opinion both of local Governments and public"

The Secretary of State's reply

It is scarcely surprising that Mr Morley cabled back on the 16th April 1908.—

"After careful consideration I must still regard proceeding as extremely unfortunate Sir Harvey Adamson's speech did in fact publish a scheme for separation of Judicial and Executive functions in Bengal, going into many details never sanctioned by the Secretary of State I must repeat what I said in my telegram of the 20th ultimo on the subject"

A reply was sent to the effect that it was believed that consultation with the public about large schemes was approved by the Secretary of State to which the Secretary of State vouchsafed no reply I cannot say that the Government of India had a good case, and Lord Minto acted very wisely in rejecting the draft telegram put up to him by the Home Department which contains the following sentence:—

"We believe the frankness with which we have taken the public into our confidence in this matter will do more than anything that we could possibly have done to allay unrest, and rally the moderates, all of whom strongly desire a separation of magisterial and police functions"

That suggested sentence, though it was cut out, reveals the real motive that inspired Sir Harvey Adamson, Sir Herbert Risley and Sir Edward Baker in making the move that they did It was frankly to be a political concession It was of course wholly inaccurate to say that all moderate opinion favours the separation, but once a sacrifice of principles to expediency has been made, the case for expediency is almost certain to be overstated It was true that the actual scheme or method of effecting separation was tentative and submitted for opinion, but nobody can deny after reading the extracts which I have quoted from Sir Harvey Adamson's speech that so far as that speech committed them, the Government had come to a decision on the principle of separation directly contrary to the unanimous views of local Governments without obtaining the approval of the Secretary of State In fact the reference to the two Bengals made in conjunction with an announcement in Council could only mean that "we have overruled you on the major question and we have decided that there is to be separation, we want your opinion now as to the best means of giving effect to it" The whole episode was a most regrettable one, for the Government of India had through its Home Member expressed an opinion prematurely on the necessity for separation, and the Home Member had allowed himself to make in Council a reflection on the impartiality of our criminal courts The only sentence in the 800 pages of opinions of the best men in India which Sir Harvey Adamson adopted as his own was this one sentence that Sir Edward Baker had written eight years before

I reserve for another chapter the result of the reference to the two Bengals

CHAPTER VII.

THE OPINIONS OF THE TWO BENGALS ON SIR HARVEY ADAMSON'S SCHEME AND THE GOVERNMENT OF INDIA'S DESPATCH OF 1910.

34 The scheme went forth to the two Governments and to the Calcutta High Court But a scheme which was not only not the outcome but actually in direct defiance of the earnest representations of all local Governments, which was founded not on proved facts, but on the opinion of its author and inspired by a desire to conciliate the Congress and the Calcutta Bar while at the same time endeavouring to affirm that the authority of the executive would be strengthened and not weakened, was clearly a scheme which would satisfy nobody, as Sir Harvey Adamson might have foreseen if he had not subordinated his judgment to those two Bengal officers who were its real authors To the Separatists the scheme did not appeal as giving at all what they wanted, by those who are responsible for the law and order of the country, Sir Harvey Adamson's speech and Sir Herbert Risley's letter were regarded as a weak surrender of convictions to the subtle pleading of agitators The scheme was bitterly resented and forcibly controverted The High Court of Calcutta after giving a sketch of the general effect of the scheme wrote —

Reception of the scheme by the Bengal and Eastern Bengal and Assam Governments and the Calcutta High Court

Calcutta High Court's views

"The first remark which the proposed scheme seems to suggest is that the introduction of a third head into each District under the title of the senior Magistrate seems not only unnecessary, but is likely to lead to friction The officer who is to fill the post of senior Magistrate is to be either a Civilian, who has chosen the judicial branch of the service, or a senior Deputy Magistrate The former is not likely to be an officer of more than six or seven years' service, and it seems open to serious question whether an officer of that standing would be fit to be entrusted with duties of inspection and control over the whole staff of Magistrates in the district without some check or control The majority of the Judges think that the magisterial judicial staff in each district should be placed under the control of its natural head, the Sessions Judge, in the same way as the civil judicial staff is under the control of the District Judge"

The method of selection and the period of service at which officers should elect for executive and judicial duties were both adversely criticised

"The proposal to divide the district into sub-districts and sub-divisions will be difficult to carry out, and may cause confusion of the existing sub-divisions, each provides ample work for one and some for more than one Magistrate On the other hand, it would be hard to find any sub-division that provides Revenue and Executive work sufficient to occupy an officer for more than two hours a day If sub-districts and sub-divisions be different, difficulties are likely to arise in regard to sub-treasuries, stamps, sub-jails and the police"

Further on the letter says —

"The proposed method for dividing the existing district staff by which a certain number of the officers are to be confined to executive work and the remainder, whether sufficient or insufficient, are to be left to dispose of judicial work, is open to grave objection The volume of magisterial work coming before the Courts, as proved by the experience of many years, is fairly constant and it is difficult to estimate the staff required for its disposal The work is certainly as important as executive work, and its prompt and regular disposal is even more essential The proposal to allow the executive branch to take all the officers it may think are wanted, and leave the balance for the judicial branch, whether it may or may not be sufficient for the work, is impracticable and the Chief Justice and the Judges must protest most strongly against its adoption Any scheme which proposes to separate the judicial and executive functions is impossible, unless it provides for the appointment of a magisterial staff sufficient for the judicial work"

In fact the High Court letter contains nothing but a series of objections to Sir Harvey Adamson's scheme Even that one precaution, the power reserved to the District Magistrate to secure through the senior Magistrate, the deputation of a

The scheme condemned

Subordinate Magistrate to any place other than the head-quarters for the purpose of holding a local enquiry, which the authors of the scheme considered necessary as a valuable safeguard, is condemned on the ground that

"it seems to place in the hands of the District Officer a power of control over the Magistrate which, if unwisely exercised, might result in friction and in considerable embarrassment in the work of the Courts"

The same argument would apply even with greater force if the Magistrates were placed under the Judge as the High Court wants. Further the Judges say :—

"The proposal to consult High Court freely on questions connected with the promotion and transfer of all officers who have been permanently allotted to the judicial branch, must result in an increase in the administrative work of the Court which, with the existing staff, it will be impossible to undertake The administrative work is now very heavy and is increasing greatly every year It will not be possible for the present staff of Judges, with assistance by the Registrar on the Appellate Side alone, to deal with it, if it be largely increased"

Finally the Chief Justice and the Judges suggest a Committee to discuss and get over these difficulties

35 No unprejudiced person reading the Bengal letter and its enclosures could hold that Sir Harvey Adamson's scheme was not condemned This letter is the best letter of Sir Andrew Fraser that I have come across It absolutely pulverises the whole of the opinions and arguments contained in Sir Herbert Risley's letter Every word of this letter which will be found in the appendices should be read and its conclusion is that the local Government declines to put forward any proposals in the hope that the scheme may be abandoned

Sir Andrew Fraser pulverises the scheme

The enclosures to the Bengal letter abound with expressions of disapproval and alarm Mr E W Collin, Commissioner of the Presidency Division, and Mr (now Sir) A Earle are among those who disapprove Mr T. S Macpherson, Magistrate of Gaya, writes —

Other Bengal opinions

"Like all the proposals which emanate from the same source, the proposal for the separation of functions is designed under the specious guise of sentimental grievance to serve the self-interest of the promoters by rivetting the yoke of the wealthy and high-born more tightly on the necks of the humbler classes and concentrating all powers in the hands of the former and their satellite, the bar"

Mr Walsh, Commissioner of the Bhagalpur Division, writes that—

"All the Collectors of this Division are opposed to the scheme and consider that it is not required, that it will weaken the authority of Government throughout the country and that it is most undesirable that it should be introduced"

Mr. Carnduff, District Judge of Patna, now a Judge of the Calcutta High Court, writes .—

"I am disposed to think that the scheme, which is unquestionably based on sound theoretical principles, ought to be tried somewhere, but I have grave apprehensions as to the result of the experiment, and I believe that there is a very real danger that it will, especially in Bengal, where, under the Permanent Settlement, the Collector has no great authority as a Revenue Officer, weaken the position of the head of the district, who is, *omnium consensu*, the pivot upon which the whole administration of the country turns"

Mr W H Vincent, a Judge of much experience, now Secretary to the Government of India in the Legislative Department, was entirely opposed to the scheme He concludes his letter by saying .

"I am, I may add, entirely unable to agree with the view expressed by the Government of India that the changes proposed will strengthen the position of the District Officer as the representative of the Government of India Its almost certain effect will be the reverse, and the danger is one that should be carefully considered before any action is taken , and if it is decided to make the experiment, it should be done very cautiously in one Division."

Mr. F. R Ros, District Judge, 24-Perganas, writes .

"I am not asked to criticize the preamble to paragraph 4 But one fact must be recognised definitely before any separation is feasible. *Unconscious* bias there *may be* in the District Magistrate in favour of conviction *Conscious bias there is* in the Deputy Magistrate in favour of acquittal."

Some few of the officers attempt different variations on Sir Harvey Adamson's scheme, holding that they are precluded from expressing any opinion on the merits of the question

Mr Justice Coxe writes :—

"I cannot really give you any opinion about the separation of the executive and the judicial, though I have devoted a lot of time and consideration to the papers To discuss or criticise a measure at all usefully a man must have at least a trace of sympathy with its object I have not this qualification I believe that the partiality of which the Government of India accuses its officers, and the supposed public belief in it, are pure figments of the imagination Of course the advantages to lawyers and oppressive landlords, arising out of inefficient criminal courts, are obvious Numerous adjournments mean high fees and enable the rich man to tire out his victim, but outside these two classes I do not think anybody in India wants the separation of the judicial and executive What is the good of shutting one's eyes to patent facts ? The mass of the criminal work is not done by the exceptionally good Deputy, but by the average one, and he must be driven If he is put under the proposed senior Magistrate, he will not be driven If he is put under the Sessions Judge and made independent of Government, he will no more dispose of his cases in a reasonable time, no more resist the dilatory tactics of the enemies of judicial efficiency than the Subordinate Judges and Munsiff do now"

Mr Justice Holmwood writes —

"As for what is really desired by the people, I think it is beyond doubt that all they want is accessible courts presided over by an Englishman whose decision, even if they do not understand it or agree with it, they believe to be just and final The persons who at present complain of the union of judicial and executive functions in the same person are the lawyers, and zamindars who oppress their raiyats , the former because they foresee increased litigation and greater power of interference with the executive, and the latter because the District Officer with his present unimpaired powers is the only person who can bring them to book"

These are the opinions of two judicial and *not* executive officers and I shall later on strive, I hope successfully, to demonstrate that if separation were to be tried in any part of India, the very last place in which the experiment should be made is Bengal

The non-official opinion is very instructive *The Bihar Planters' Association* are dead against the scheme, and *the Anglo-Indian Association* are no less firm in their opposition

Maharaja Sir Prodyot Coomar Tagore, writing on behalf of the British Indian Association, which had already supported Mr Man Mohan Ghose, naturally found that the scheme did not go far enough for the Association They wished the Magistrate to be wholly under the control of the High Court He wrote—

"If the District Officer thinks it necessary that a Magistrate should be deputed to a place to make any local enquiry or trial, he should apply to the District Judge, and the District Judge, if he so think, may send a Magistrate for doing this work"

This last remark affords a very good instance of the sense of responsibility for law and order which the Association possess

Views of the Bengal National Chamber of Commerce

The Bengal National Chamber of Commerce, through Rai Sita Nath Ray Bahadur, urge the same plea that we should completely subordinate the magistracy to the District Judge

"In this connexion, the Committee beg to suggest that, of the two superior officers, the District Officer and the Senior Magistrate, one at least should be recruited from the Provincial Service It would be a retrograde move to select both the officers from the Indian Civil Service. In the interest of good government it is necessary that the officers, who are to have charge of judicial sub-divisions and of executive sub-districts, should always be in touch with the people and should always move freely among them, thereby ascertaining the wants and requirements of all classes of the people The Committee, therefore, respectfully urge that these officers should, as hitherto, be recruited from the Provincial Service."

Views of other Associations

The Bihar Landholders' Association follow the British Indian Association and adopt the same phraseology They, too, wish the magistracy to be under the Judge

The Bhagalpur Landholders' Association follow the same lines They want the Judge to control the magistracy

"The Committee of my Association is glad to think that the scheme must, for one thing, put a stop to the scandals now attendant on every application made to the High Court for the transfer of a criminal case from one district to another"

This remark is hardly intelligible, but it seems to imply that every application for transfer to the High Court is based on some scandalous action of the Magistrate A gross perversion of truth

The remarks of the *Orissa Association* are amusing They agree to the separation of Judicial and Executive functions, but—

"the Association ventures to think, however, that the choice made by Government in giving this scheme a trial in the districts of Bengal and Eastern Bengal and Assam is not very happy, since it is well known that there is a good deal of unrest in Bengal, not merely dependent on, but quite apart from, the dissatisfaction due to the combination of the Executive and Judicial functions, and it is very unlikely that the boon conferred by the introduction of the scheme will do away with, or even mitigate, the unrest On the contrary, there is the danger of the Executive ascribing the difficulty in administering the country and controlling the people to the loss of their authority consequent on the separation of the two functions"

The Association wanted the Magistrate to be under the High Court and the District Officer deprived of power to try cases under sections 108 and 110 of the Criminal Procedure Code

The Hon'ble Mr F A Larmour representing commercial interests, was against the weakening of the authority of the Magistrate that the scheme involved

The Nawab of Murshidabad considered that—

"the scheme will meet the requirements of the educated community to whose views it is undoubtedly a large concession, a continuance and satisfactory working of which will largely depend upon the co-operation of the community in ensuring and preserving public peace"

The opinion of Nawab Bahadur Saiyid Amir Husain, C I E, of Mozufferpur, includes the following passage ;

"After mature and deep consideration I am honestly and seriously of opinion that the separation of the two functions of District Officers will be disastrous to the best interest and welfare of the people at large, though it will be exceedingly advantageous to the microscopic minority which has at last succeeded in forcing its views on the authorities of the day, and I am further of opinion that the introduction of the scheme is at least premature and most unsuited to the present time It should, therefore, at least be postponed for a more convenient season or period, more especially in Bihar"

Nawab A F M Abdur Rahman writes —

"I beg to state at the outset that after very careful consideration and from my personal experience of the various districts in Bengal and Eastern Bengal, extending over many years, I am strongly in favour of maintaining the existing system for the present without material alteration"

Although he does not wish to object to the scheme of experiment on a small scale, he adds

The change proposed may weaken the power and position of the District Magistrate and impair the authority of the Government unless it is worked with great caution and care"

Khan Bahadur Abdul Jabbar, C I E, writes two notes against separation. In the first he asks for a solution of the question by the employment of men of high character and good family In the second, he says that—

"the masses of the people complain of injustice, but they attribute it to what is called the Vakil Raj"

I draw the special attention of my Hon'ble Colleagues to the second note by Khan Bahadur Abdul Jabbar, which will be found in the appendices, as he represents the opinion of large number of persons who are not in love with the aims and objects of the Congress

Sayyd Zahir-uddin, Vice Chairman, District Board, and Honorary Magistrate, Patna, writes

"I have carefully studied the literature of the problem, and ascertained the views of landholders and legal practitioners who do not belong to the Congress or to any association at which the pleader element preponderates or predominates, and the consensus of opinion is that no change in the present system is desirable"

It will thus be observed that the Muhammadan gentlemen consulted all agree with the British officers that the change proposed will be disastrous and is merely a Congress move The *Maharaja of Burdwan* suggests the dissociation of the Collector from the police rather than from the Magistrate, and he urges great caution

"Unforeseen complications might crop up and unnecessary jealousy and ill-feeling created between the Executive and the Judicial, which everyone knows exists now even as high as in the High Court"

Sir Prodyot Coomar Tagore writing as an individual is quite different from the same gentleman who wrote as Secretary to the British Indian Association

Sir P C Tagore's individual opinion

In that latter capacity he advocated extreme separation, Magistrates being put under the Judges and so forth In his private capacity he writes —

" Separation of executive and judicial functions, under ordinary circumstances, is certainly unexceptionable Considering, however, the present situation of the country, the introduction of the measure at this time does not seem to me to be expedient both from political and administrative point of view Executive authority should, under existing conditions, be strengthened and not weakened, and means ought to be taken to increase its prestige and not diminish it It is inadvisable, I venture to think, to authorise, even experimentally in Bengal, the adoption of such a measure, for that would lead to the popular belief that Government, though it is acting cautiously, is desirous of depriving executive officers of some of their most important powers Such a belief would be productive of incalculable mischief Safeguards should by all means prevent abuses of executive authority, but no steps, I am firmly of opinion, should be taken in the present state of unrest in the country, that would, even in the slightest measure, lower the position of executive officers in the eyes of the people "

This last extract is most interesting on account of the light that it throws upon the manner in which the so-called leaders of the people in their capacity as Secretaries to Associations and such like identify themselves with advanced opinions which as private individuals they not only do not share but actually repudiate

Raja Barkuntha De Bahadur confines himself to criticising some of the details of the scheme but notes that—

Opinion of other Indian non officials

" whatever may be the conditions in the advanced districts of Bengal, there is, to my knowledge, very little of the feeling of distrust and dissatisfaction alluded to in paragraph 4 among the people or even among the educated community generally so far as the Orissa Division is concerned "

Then comes a series of out and out advocates of complete separation Raja Peary Mohun Mukherji, Raja Pramatha Bhusan Dev Ray of Naldanga, Raja Rao Jogendra Narayan Ray of Lalgola, content themselves mainly with approving the principles of the scheme The Hon'ble Babu Deva Prosad Sarvadhicari after saying that the reform is needed in every district, that it does not go far enough, proceeds to illustrate what a practical and logical mind he has got by saying—

" Furthermore it would be an advantage to have certain executive functions say, for example, in connection with education, local self-government and even sanitation discharged by judicial officers whose tact and touch with the people and whose equable temperament would help in work of this particular kind being better done than by executive officers, who engrossed with their police and superior executive duties involving, nay, entailing lesser touch with the people, would necessarily be less accessible to them "

This most ludicrous indication of the writer's mind is further elaborated in another part of his letter.

Then there is Raja Kishori Lal Goswami He is another authority who accepts the scheme with a little suggested modification for controlling the Collector's power further The Hon'ble Babu Radha Charan Pal follows suit The Hon'ble Babu Jogendra Chandra Ghose, Member of the Bengal Legislative Council, seems to halt between two opinions He approves the scheme but suggests that Judges and Magistrates should be recruited from the Bar which " would prevent much failure of justice in sensational cases, when the inexperienced Judge or Magistrate has to deal with clever lawyers, and also in cases requiring judicial experience for fair trial " but he adds—

" In my opinion also, if all judicial powers be taken away from the head of the district, it would seriously affect his prestige and usefulness "

I include in the appendices the opinion of Babu Bhupendra Nath Basu, because I have included important non-official opinion on the other side I need

Babu Bhupendra Nath Basu's opinion

hardly comment much on this opinion, but I cull a few choice phrases After stating that the administration of justice has been the chief bulwark of British rule in India, he goes on to assert the ridiculous proposition that this is entirely because of civil justice ; whereas every one knows that civil justice is not

popular in this country because of its rigidity in enforcing contracts under which the unsophisticated make over property to the money-lender He then says

"Every Indian feels that the criminal law is 'ferocious,'—I may be pardoned for using this expression—any one reading the Indian Penal Code and not knowing anything of the country, would come to the conclusion that it was meant to operate in a country purely inhabited by criminal classes"

As if any Penal Code in any country would be interspersed with complimentary descriptions of its inhabitants!

"In Bengal," he says, "the English Civilian does not come into personal contact with the peasantry and the people in the collection of revenue, he has but little opportunity of knowing them He sees the litigants in courts and rarely meets people except on ceremonial visits the result is that if a respectable person happens to be involved as an accused in a criminal case, may God have mercy on him! From the Bench he receives no consideration to the police he is a rich prize and his fate can be better imagined than described the worst of it is that the whole of criminal justice is in the hands of the police"

Thus after showing to his own satisfaction that the police are all powerful, that criminal justice is entirely in their hands, he proceeds to remark—

"It has often been asked why, having regard to the peace prevailing in the country, the security of life and property to an extent not enjoyed in India under any previous Government, there should be so much discontent, not only amongst the upper classes, but even amongst the masses? To those who know the country the answer is plain it is the system of administration of criminal justice"

This is the kind of man upon whose advice Sir Edward Baker placed so much reliance—the man who puts down civil justice as the bulwark of British rule while the criminal law is "ferocious" and the man who states that the present executive officer has no touch with the people but apparently expects that, if he had still less touch with the masses and saw only the litigants, he would do much better Finally after describing the state of utter tyranny and extortion to which everybody poor and rich is subjected, he speaks of security to life and property never before enjoyed Is it on such evidence that Sir Edward Baker remarked that "our criminal courts lack the atmosphere of cool impartiality?"

Results of the reference to Bengal and the Calcutta High Court summarized

So far as Bengal was concerned this was the result of the reference Sir Andrew Fraser urged the abandonment of the scheme, the High Court criticised its suitability, every officer of the Bengal Government including Collectors and Judges were dead against it The Muhammadans consulted were against it and some of the Hindus, while the only supporters were the adherents of the Congress While accepting it as half a loaf, they pleaded for an out and out separation and the subordination of the Magistrate to the Judges, for the appointment, promotion and transfers of the Magistrates to be taken away from the local Governments and placed under the High Court while the High Court itself peevishly stated that it had not time even to give advice to the local Governments about transfers and promotions

Letter of the Government of Eastern Bengal and Assam

36 The letter from the Government of Eastern Bengal and Assam is also included in the appendices to this chapter The Lieutenant-Governor Sir Lancelot Hare was dead against the scheme as he had been when he gave his opinion on the memorial some nine years previously He writes (paragraph 3).—

"The view that the advance should be made with the greatest caution is strengthened by the fact that it is to be undertaken as a concession to public opinion, which is entirely swayed by lawyers in this matter, and by the reflection that it must proceed on theoretical lines, no new facts having been established and no new circumstances having arisen which would lend support to it since the attack made upon the present system was so conclusively disposed of in the correspondence to which the Government of India have referred The expressions of public opinion on this subject have been more numerous in Bengal than elsewhere, because lawyers are ubiquitous in that Province, and the Lieutenant-Governor ventures to deprecate the suggestion, made both in the Government of India's letter and in the speech of Sir Harvey Adamson, that a change is called for in Bengal and in Eastern Bengal and Assam which is not desirable elsewhere"

He proceeds to take exception to the various features of the scheme remarking upon the criticisms of the High Court He likewise condemns the High Court's preference for putting the Magistrates under the Judge He then, in

accordance with the Government of India's orders, makes some proposals for carrying out the scheme should they insist upon it

He expresses strong preference for a more gradual system of separation to be effected by posting Additional District Magistrates to certain districts, the District Magistrate being gradually dissociated from magisterial work There is no mistaking Sir Lancelot Hare's attitude in paragraph 18. He states that the term 'experiment' is a misnomer He writes.—

"The so-called experiment will give us but little experience, as the main feature of the scheme, the absolute separation of the magisterial branch of the service from the executive branch, cannot be carried out until the scheme is extended to the whole or greater part of the Province, and, as Mr Nathan points out, this change will take many years to produce its full effects Moreover, Sir Lancelot Hare regrets that he cannot but view this separation with apprehension

"The divorce of the Magistrates from a practical knowledge of the revenue conditions of the province, from personal acquaintance with the inner working of the police, and from the intimate knowledge of the wants and conditions of the people, which is provided by work on survey and settlement proceedings, as Sub-divisional Officers, and in other executive appointments, will be fraught, in his opinion, with grave danger to their efficiency, and the substitution of a higher standard of knowledge of the law, to be utilised solely within the four walls of a court, does not appear to him to afford adequate compensation"

The Adamson-Risley experimental Scheme generally condemned

37 The experimental scheme launched by Sir Harvey Adamson and Sir Herbert Risley is thus condemned by the two local Governments concerned and by other officers It did not find favour with the High Court and it did not satisfy that section of the Press and politicians who wish to rob the executive of their authority In these circumstances it might have been expected that the scheme would be dropped, but this was not done None of these opinions, whether of local Governments or of their officers, Commissioners, Collectors and Judges, or of persons like the Muhammadan gentlemen consulted and some of the Hindus were accorded the slightest attention The only action taken was to refer the question back to Bengal in order that the views of Sir Edward Baker, who was the real author of the scheme, and had meanwhile succeeded Sir Andrew Fraser as Lieutenant-Governor of Bengal might give his opinion upon it Sir Edward Baker's reply of the 11th June 1909, is reproduced in the appendices to this chapter Sir Edward Baker begins by reiterating his former views as to the want of impartiality in the criminal courts and the distrust of the people in them, which is the starting point by which all advocates of separation always begin by begging the question at issue He then goes on to agree with Sir Andrew Fraser that the Judge is not the proper authority to supervise the magistracy The solid opinions against the scheme he describes as the consequence of temperament and inherent dislike of constitutional change rather than of any reasoned consideration of the measure Amidst a good many paragraphs about the merits of the scheme, and his firmness of his belief that the system would strengthen and not weaken our hands, he shows that he has serious misgivings, or at any rate, that he has not the courage of his convictions and he ends by being reluctantly obliged to recommend the postponement of the scheme But he is quite ready to throw the whole responsibility upon the Government of India It is very likely that they may not take an equally serious view of the objections to the immediate introduction, and if so he and his officers will do their best to carry that out He can give an opinion in his private capacity as he did in Bengal in 1900, for the reference made to him was personal, or with the comparatively restricted responsibility of a Member of Council noting upon a case of another Department with which he was not directly concerned, he dared to premise that everybody who disagreed with him was prejudiced, but when it came to him to decide as the officer responsible for the peace and order of Bengal his confidence failed him He did not believe that the scheme would weaken the executive, but as most people did owing to temperament and prejudice, their prejudices must prevail and the scheme must be postponed unless indeed the Government of India would be kind enough to accept the responsibility which he, the Lieutenant-Governor of the Province, was afraid to accept, in which case he would cheerfully acquiesce Similarly as will presently be shown

The scheme referred again to Sir Edward Baker

Postponement of its introduction recommended even by him

Sir Harvey Adamson as Lieutenant-Governor did not wish to look at the scheme any more

38 When the case came to be considered again in Council at the beginning of 1910, Sir Herbert Risley was acting as Home Member He once more reiterated his views as to the strengthening of the executive which would result from the scheme but he also acquiesced in its postponement Lord Minto's comment was—(the only comment he committed to paper from first to last on this case)

Lord Minto's observations

"I have always been in favour of the principle of separation and have no doubt that it will eventually be brought about But for the present, postponement is unavoidable Financial stress alone would render the required re-organisation impossible, and for political reasons it would not be advisable to take the question up at the present moment"

Sir G Fleetwood Wilson's note

Everybody agreed with Lord Minto but the Hon'ble Sir Guy Fleetwood Wilson noted—

"That when the time comes for trying the experiment I think it will be for consideration whether it should not be tried in some province other than the two Bengals"

Views of Sir Archdale Earle and Sir John Jenkins

Before a draft despatch could be prepared to the Secretary of State, Sir Harvey Adamson had proceeded to Burma as Lieutenant-Governor and Sir Harold Stuart had gone on leave Mr Earle who succeeded as Secretary, in putting up a draft, wrote that it had got beyond the stage on which he could note but if he had been noting he would have brought out clearly that the goal at which the reform party were aiming was the complete subordination of the magistracy to the High Court The late Sir John Jenkins who had just joined the Council disapproved of the whole policy but did not at that stage wish to intervene as the modified proposals in the draft despatch did not, he thought, actually endanger the situation The draft was somewhat modified in deference to Sir John Miller's views and the Government of India issued their despatch of 21st July 1910 To this despatch Sir Harvey Adamson's famous budget oration formed an enclosure and with it has been reproduced in the appendices to this chapter. Apparently Sir Robert Carlyle did not wish to sign this despatch but the printed copy contains his signature.

Draft despatch modified at Sir John Miller's instance

39 The scheme put before the Secretary of State in that despatch was nothing but the scheme sketched by Sir Harvey Adamson, but the despatch did not attempt to deal with a single one of the criticism of details by the High Court or by those who tried to give it effect, including the proposals of Sir Edward Baker himself It was deliberately concealed that the scheme would not satisfy the out-and-out separatists while paragraphs 3-4 dispose of the thousand pages of opinion, of which 900 at least are totally opposed to separation in any form, by the simple expedient of brushing them aside There was in fact no attempt to convey to the Secretary of State the arguments of some of the greatest administrators in India Sir Harvey Adamson's reasons in favour of a change or Sir Edward Baker's note of 1900 are allowed to outweigh the whole of these opinions The careful analysis of the opinions made by Sir John Hewett and Sir Denzil Ibbetson might never have been written, unless the Secretary of State and his advisers waded through the thousand pages of print which remain recorded in the proceedings of the Government of India but were not annexed to the despatch There was nothing to show the Secretary of State that the arguments about the subserviency of the Magistrate and the suspicion of the people in the fairness of the Courts have been refuted over and over again not only by the highest executive officers but by some of the most experienced High Court Judges, Sir Henry Prinsep, Sir R. Benson, Sir Arthur Strachey and others. Nor could the Secretary of State get to know the fact that the very areas in which Sir Edward Baker suggested that the experiment should be first made happened to be the Presidency Division of Bengal demonstrated by Mr James Munro to be the most criminal part of the province Finally on the ground of the cost being prohibitive and the change being at the time particularly inexpedient, the despatch fell back upon the rather vain hope that the introduction

Inadequacy of despatch except as presentation of the Adamson-Risley scheme

of an additional District Magistrate might possibly prove the ultimate solution of a thorny question

A half hearted despatch

With great respect I cannot regard that despatch as anything but half-hearted If there was a really great abuse to be reformed it was wrong to cast it aside almost indefinitely The whole thing was nothing but a political sop to the lawyers of Bengal justified on the opinion of two men, Sir Herbert Risley and Sir Edward Baker that the powers of the executive would be strengthened and not weakened, although the Congress and the Bengali Press have all along proclaimed separation to be the one means for curbing the executive which it is their avowed policy to weaken. The strength of the belief in the scheme is contradicted by the attempt at the end of the despatch to fall back upon the provision of an additional District Magistrate as a step in separation and the opinion that this measure might form the solution of a question of this kind

CHAPTER VIII

THE PRESENT STAGE OF THE QUESTION

Secretary of State's reply

40 To the Government of India despatch written in July 1910 the Secretary of State replied by despatch in January 1911 which is included in the appendices to this chapter The first five paragraphs of the despatch merely summarise in brief the recommendations made by the Government of India The only statement made in those paragraphs which seems carelessly worded in the papers as I have presented them is the statement that Sir Harvey Adamson's scheme was accepted in principle by the two Governments of Bengal and Eastern Bengal Sir Andrew Fraser had rejected it *in toto* and although Sir Edward Baker may have accepted it in principle he had had to make several modifications which greatly added to the cost of the scheme The Government of Eastern Bengal and Assam cannot, however, be said to have accepted it even in principle Sir Lancelot Hare worked out the tentative scheme because he was directed to do so but he made it clear—

(i) that it was merely a concession to lawyers not required by the circumstances of the country,

(ii) that the educational development of Eastern Bengal and Assam upon which Sir Herbert Risley had laid such stress in his letter did not justify its application to East Bengal,

(iii) that there was no more need in Bengal than anywhere else;

(iv) that he regarded its introduction with some misgivings, and

(v) that he expressed a strong preference for proceeding gradually through the device of having an additional District Magistrate in heavy districts

Amendments suggested

Lord Crewe then proceeded to suggest that while in general accord with the Government of India's proposals and prepared to consider any form of scheme submitted when the time is ripe, that the title of senior magistrate under the scheme should preferably be altered to that of Assistant District and Sessions Judge Secondly he asked whether there was any real necessity for relieving the staff of subdivisional magistrates of their administrative functions Finally he wanted the preventive powers of the District Magistrate further strengthened Obviously therefore Lord Crewe is not convinced of the necessity of separation down the line and he asks us to reconsider this It is clear that separation as such is unnecessary and that the recommendations which I shall make in my last chapter will remove any of the last vestiges of the risk of improper use of power which may perchance still survive and we shall not find the Secretary of State likely to oppose us

Views of the Home Department on Secretary of State's proposals

Sir Archdale Earle and the late Sir John Jenkins were opposed to any conversion of the Senior Magistrate under that scheme into a Judge They had no obvious objection to leaving the sub-divisional officers out of the scheme but they thought that this should be submitted to the local Governments As regards the preventive powers of the District Magistrate, this question they said was being dealt with under the general amendment of the Criminal Procedure Code which was then and is still under consideration It was decided in Council that the local Governments concerned should be consulted and the correspondence was sent by Sir John Jenkins' direction to all local Governments as, although the matter at present only concerned the two Bengals, the scheme adopted there might eventually have to be extended to them

Correspondence sent to all local Governments

41 The replies of the local Governments are to some extent shorn of the interest which would otherwise attach to them by the fact that the introduction of some scheme of separation is regarded by several as inevitable The Government of Bengal expressed a strong preference for the term "Chief Magistrate" but rightly pointed out that from the separatist's point of view the exclusion of the sub-divisional magistrate from the scheme would make a farce

Views of Bengal Government

of the whole project Sir William Duke is totally opposed to any separation as I have the best of reasons for knowing and he hints at this in his letter, but he regarded the matter as *res judicata* and merely pointed out that the reform would not satisfy those in favour of separation He quotes the words of the Hon'ble Mr Goswami "This modicum of reform will fall so far short of popular expectations that far from evoking gratitude it will revivify popular discontent"

United Provinces Government

The United Provinces Government suggest that the new senior magistrate should be called district magistrate, the chief executive officer remaining as Collector or Deputy Commissioner They agree that the separation, if carried out at all, would have to go all down the line It seems clear above all, the letter says, that the scheme of separation must be carried out either in whole or not at all

Punjab Government

The Punjab Government was opposed to any separation at all but agreed with the United Provinces Government that the new officer should be the district magistrate for the purpose of the Criminal Procedure Code, the Deputy Commissioner being empowered with preventive powers As regards the subdivisional officers, the Lieutenant-Governor referred to the letter of the Punjab Government of 1901 and said that those who were against separation may very well think that if the present district magistrates are deprived of their powers the citadel is, so to speak, surrendered and what happens to the outworks is comparatively unimportant The letter concludes by pointing out the impossibility of dual control over the subordinate magistracy The Eastern Bengal Government thought that the title of "Chief Magistrate" would be the best and was ready to exclude sub-divisional officers from the scheme The Lieutenant-Governor was of course writing from the point of view of a supporter of the union In a demi-official of the same date Sir Charles Bayley said that if the scheme were to be carried through and extended, the district officer should be called Deputy Commissioner and the senior magistrate should be called district magistrate He thought the time inopportune for any change The Madras Government confined itself to approving the term "Chief Magistrate", but was in favour of maintaining the existing system as regards sub-divisional magistrates

Eastern Bengal and Assam Government

Madras Government

Bombay Government

The Bombay Government took the strongest exception to the whole scheme, repeating its conclusions of 1900 (quoted in Chapter IV) which was still the unanimous opinion of the Bombay Council The change, in Sir George Clarke's opinion, in this Presidency at least, would not be liked by any one specially during unrest and agitation

Burma Government

The Burma Government (Sir Harvey Adamson) gave its opinion that the title "Senior Magistrates" might be "Civil Judicial Magistrate," that the separation should extend to the sub-divisions although it might start with district magistrates In paragraph 5 Sir Harvey Adamson explains that the matter will settle itself by evolution In unimportant places district magistrates had to be empowered to try cases under section 30 of the Criminal Procedure Code so that district magistrates in the heaviest districts now try very few cases whilst special township magistrates had had to be appointed to relieve and help the sub-divisional officers

Sir Harvey Adamson's remarks analysed

Sir Harvey Adamson's remarks are true, perfectly true, but what has become of the evil of the magistrate being under the supervision of the district magistrate, and of the district magistrate being able to try cases and having appellate powers? Does Sir Harvey Adamson still feel the want of an impartial atmosphere and regard the alleged belief in the want of impartiality of the Courts to be so serious that the opinions of the most experienced administrators of the country must be brushed aside in favour of a concession to agitation? Does he still feel that the complete exclusion of district magistrates from magisterial powers is a necessary measure in order to strengthen the executive? Not a bit of it He wants to leave things as they are and trust

to time so that under the existing system there will be more and more division of labour without separation of functions It is a comfort to find that Sir Harvey Adamson, removed from the influence of Sir Herbert Risley and Sir Edward Baker, has recovered his judgment and forgotten the day when he described as "complacent Commissioners," to use his own significant expression, the many honourable men who refused to sacrifice their own conviction before the shrine of political expediency He has indeed returned to the days when he wrote as Commissioner of the Mandalay Division* that "the division of powers is quite contrary to oriental ideas of the fitness of things and it would infinitely weaken the administration than which there could be no greater evil in India In England the preservation of peace, the suppression of crime and the punishment of criminals are mere matters of routine In many parts of India they are the very breath of life of the administration They are very closely connected together and they cannot be kept in separate and independent hands without a loss of strength that would be disastrous" What other comment can be there than this? Philip was sober once, then when in Council he was drugged, now he is once more in his sober senses

Central Provinces

42 The last of the opinions of the local Governments is my own written as Chief Commissioner of the Central Provinces It represents the convictions not of an official lifetime but convictions formed after an official lifetime At the time I wrote it I expected to be Chief Commissioner until June 1912 but before the final proof was passed I was called to Council to take the place of the late Sir John Jenkins I invite the attention of my Hon'ble Colleagues to that note because to do otherwise would be to exclude the representation of a minor but still important province But I wish to be perfectly fair, and I have added to that note a copy of a memorandum written at my request by Mr H Stanyon, Additional Judicial Commissioner, Central Provinces I particularly asked him not to hesitate to criticise my note and to state his genuine opinion Mr Stanyon has quite an unique knowledge of the people in three Provinces; he was born in India, he was brought up among the people, he then went to England and became a barrister and he practised for 16 years in moffasil courts He was in 1897 appointed as Sessions Judge and ever since that year till now he has been on the bench of the local High Court Mr Stanyon disagrees with my conclusions in two or three matters, but even if all his points are conceded he gives the very strongest reasons based on his own knowledge and experience for his belief that separation of these functions will be the downfall of British authority In matters of criminal administration Mr Stanyon's experience is unique and most valuable He can speak the language like a native of the country, and his knowledge of facts as well as of the magistracy and police is most intimate His note contains also many valuable remarks and suggestions as to the relation which ought to subsist between judicial and executive officers and the necessity of co-operation between them As regards the points of difference between Mr Stanyon and myself, Sir Harvey Adamson might not have actually given utterance to the particular words, but the inference that the people were justified in saying that the criminal courts were not absolutely impartial is an inference which no person could fail to draw from them. I think that Mr Stanyon makes insufficient allowance for the ease with which a Magistrate, who has been taken to task by the Sessions Judge for convicting in a particular case, can excuse himself by saying that he was influenced by the views of his District Magistrate The truth of this excuse is never tested, though the statement may be quoted and may prejudice the case. However, I do not wish to take up time in discussing these differences of unessential points with Mr Stanyon. He is by experience, training, and instinct a judicial officer, and is fully alive to the judicial aspects of the case, yet he is emphatically of opinion that the separation of functions would be a calamity.

Mr Stanyon's Memorandum

43 With the study of these opinions the case is brought up to date and the Government of India have now to decide what course to adopt In the next Chapter I state the case in its most modern and recent aspects, and in my final Chapter I put forward certain recommendations.

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* *Vide* page 19 *supra.*

CHAPTER IX

THE MODERN ASPECT OF THE CASE

Evolution of the function of the District Magistrate since 1848

44 I have now in the preceding chapters brought this long controversy up to date, and it only remains for me to set out the modern aspect of the case as it stands to-day

The whole setting has completely changed since the days when Sir John Peter Grant wrote his minute, when there was no separate department of police, and when the District Officer was himself responsible for the investigation and detection of crime with the aid only of daroghas on Rs 25 per month

The papers contained in Mr Quinton's compilation show how, after several attempts at administering criminal law by civil Judges had failed, the present system of making the district officer also the Chief Magistrate was independently evolved in the three Presidencies and in Northern India as the only safe method of administering the criminal law. No longer is the criminal law confined to antiquated regulations The Indian Penal Code, the several Police Acts and successive Codes of Criminal Procedure have laid down the respective functions of the police officer, the Magistrate and the Judge Old arrangements by which the Commissioner was Sessions Judge, and the Collector the District Judge have vanished everywhere; they were make-shift arrangements required for the economical administration of poor and backward tracts They have all passed away, and no longer can the District Magistrate be described as thief taker, nor does he fulfil the functions of a Judge Further and further he has receded from the actual trial of cases. In every case in which an accused person has a genuine suspicion of magisterial bias, he can apply for transfer and this power is not a dead letter Rather is it constantly, and indeed in Bengal consistently, abused Even in the cases in which a District Magistrate can have no personal bias but has himself given orders for the prosecution upon facts which have come to his knowledge or suspicion, he cannot try the case himself nor does he wish to do so

The subordinate magistracy has also changed and is changing Formerly they were recruited from the ranks of ministerial officials whose habits of taking orders when in doubt induced them to make untimely reference to District Magistrates. Now the magistracy is being filled by educated men with University degrees The complete independence of the Magistrate *quoad* the case before him has been dinned into their ears and has now become an article of faith with them Everyone knows that some Magistrates, European and Indian, entertain a strong distrust almost amounting to bias against the police All the old catch-words and 'ad captandum' phrases, with which the separatists assail our ears, are no longer applicable The old chimeras of private 'chits' to Magistrates, and the promotion by the percentages of convictions, even if they ever had any reality, are extinct and have disappeared In my ten years as Commissioner and Chief Commissioner, I never once knew a case in which the percentage of convictions in any Magistrate's court was even reported upon or made the basis of any recommendations At no time were the accusations of bias and abuse of powers other than gross exaggerations To-day such accusations are sheer perversion of facts Yet every separatist article in the press, every speech in favour of separation serves up the old familiar language of prejudice whereby to hoodwink the British public and obtain its support in order to serve the totally different end of the agitators

Fallacy underlying the cry for separation.

45 But there is one extraordinary fallacy underlying the whole cry for separation, which has either never been grasped by the separatists or is wilfully ignored by them. Every criminal case which arouses public attention is made the text for a fresh outcry for separation; but in every case of this kind, it is not the conviction of an accused person by a subservient magistracy but his prosecution at all that cause the outcry Now whatever system were to be followed, prosecutions must be launched by somebody, the police, the district officer, or the magistrate If the magistracy were separated off into a judicial body they could not be charged with the duties of prosecution, because to charge them with this

duty would be a negation of the objects of separation The police and the district officers must therefore in any case be the persons to set the law in motion

Separation would not have prevented the Midnapur case

For example, if all the allegations made against Mr Donald Weston and the police officers in the Midnapur case had been true, all the incidents alleged might equally have occurred under the most complete system of separation If only some of these persons were to stop to think for a moment when they cite their instances they could not but perceive that the alleged hardship to alleged innocent persons brought before the courts are only the direct consequences of their being prosecuted at all Once they are put on their trial the action of the Magistrate or the Court is so circumscribed by the Codes, by the powers of transfer, by application to the High Court, and so forth, that their conviction becomes a matter of great difficulty and cannot be arranged to order at the discretion of the District Magistrate.

Any idea that the separation of functions would prevent the police or the district officer from prosecuting persons whom they believed to have broken the law is a complete delusion But if it were not a delusion, it would be the strongest possible argument against separation

Other false assumption of the separatist

There are other ridiculous assumptions made by the out-and-out separatists which can only go to show how utterly they are lacking in any sense of proportion It is commonly said for instance that a Magistrate having read the police report is no longer capable of taking an impartial view It might just as well be urged that a Magistrate having examined a complainant and issued process against an accused person is no longer able to be impartial; that a Judge who has read the committal proceedings of the Magistrate cannot be expected to give the accused a fair trial, or that a court that has heard the prosecution case and charged the accused is no longer competent to hear the defence It is by stupid fallacies like these that the case for separation is propped up To judge from the picture drawn by separatists one might suppose that the District Magistrate and his myrmidons, the subordinate Magistrates, are in league with the police to seize anybody against whom the police, or the Magistrate may have a spite, that he is hauled up, that his conviction is a foregone conclusion, and that the High Court, the palladium of justice, is the only safeguard between a band of cruel oppressors and their innocent victims

Secret of the success of the existing system

46 Let us throw aside for a moment all these crude absurdities, and examine what is the secret of the success of the present system The great secret of the success of the present system is that the police have above them not a partisan who will always see eye to eye with them, but a man whose training as a Magistrate gives him a sense of responsibility A man who is in the habit of looking at both sides of the question is a much better supervisor of the police than a man with whom the prosecution of offenders is the principal and guiding object of his life's work Even with the improvement of the police service and with the better educated District Superintendents of Police that are now growing up, there must generally be some lack of judicial perspective, and of nice sense of proportion This wider point of view is supplied by the general supervision and control and the all-round experience of the District Magistrate

On the other hand the responsibility for the maintenance of law and order is the great corrective of the ultra detached view to which a magistrate may become inclined, and it is only the executive responsibility of the district magistrate and his subordinate magistracy which keeps the magistracy from falling into the groove of the ordinary civil court People are apt to ask, if Munsiffs and subordinate judges can be trusted to try the civil cases of the country without executive supervision, why they or men of a similar class appointed to the courts of a separate magistracy, should not be entrusted also with criminal work?

Objection for a separate magistracy

I do not wish to impugn the merits of these judicial officers; many of them are very good lawyers and many of them do their best to administer justice But to suppose that they enjoy the confidence of the people in any

special degree and in marked contra-distinction to the want of confidence felt in the magistracy is an assumption entirely unwarranted In this connection I will tell my Hon'ble Colleagues a story When I was in Madras last August, Sir Murray Hammick, then acting as Governor of Madras, informed me that at Cocanada the Hon'ble Mr Subba Rao had impressed upon him the necessity of sending a European District and Sessions Judge to the Godavari District, on the definite ground that the Munsiffs and Subordinate Judges were not properly controlled by any Indian superior officer Sir Murray Hammick rather twitted him upon the inconsistency of his request with the constant pressure that he put upon the Imperial Council to employ more Indians in higher positions Mr Subba Rao was however unable to perceive any humour in the situation and merely reiterated his request to the Governor on the ground that these subordinate judicial officers were not properly supervised and were getting out of hand

Need of European supervision urged by Mr Subba Rao

But whatever may be the merits or demerits of our civil judges, the disposal of civil cases is not comparable at all with the disposal of criminal cases The civil judges are deciding cases between A the plaintiff and B the defendant They decide them on the balance of probabilities and on the various law points that may arise Unless they are corrupt, which is no doubt rare, it is no easier to decide for the defendant than for the plaintiff There is no question of benefit of the doubt: whichever way they decide the party unsuccessful has the right of appeal But criminal cases are entirely different The Court is the magistrate, and is bound to do its best to arrive at the truth of the matter under enquiry The plaintiff is the Government and the plaintiff is always the same; and if the case is decided in favour of the defendant, the plaintiff has no right of appeal

Disposal of civil and criminal suits not comparable

In simple and straight-forward cases where the accused is a poor man, there may be little difficulty, but in difficult cases or where the accused is influential, it is far otherwise It is far easier to acquit than to convict It is easy to give the accused the benefits of timid doubts, to find discrepancies in evidence, and to win the cheap applause of the bar library or the press by discharging an important accused person The magistrate may, if he convicts, find his judgment reversed; if he acquits his order cannot be challenged; for, very naturally, the limited power of appeal reserved to a local Government by the Code is exercised very sparingly, and High Courts are most unwilling to interfere in appeal cases from acquittals except in test cases of legal interpretation or unless the miscarriage of justice is so patent and flagrant that the release of the accused person would be a public scandal. Even under the present system a separatist like Sir Edward Baker admits that subordinate magistrates have a bias in favour of the accused Is that bias likely to be less when the magistrates have been entirely cut off from all executive responsibility for peace and order? The Madras papers show us that even the stationary sub-magistrates of Madras on ₹125 and ₹150 give themselves the airs of little High Courts, and this is in spite of the fact that though they have been separated from Tahsildars, yet they are still under the supervision of sub-divisional and district magistrates What would have happened if the sub-divisional and first class magistrates were to become imbued with similar sentiments? Then would surely arise the deadlock predicted by Sir Frederick Halliday in which a feud would ensue between the police and the magistracy If crime increased, as it is even now increasing, in India, partly because of the difficulty of securing convictions, the executive officers would urge that they were powerless to restrain crime if the judicial magistrates would not convict, while the magistracy would retort that the police sent up false cases, or that their investigations were so badly done that they were bound to acquit

Tendency to acquit when accused is influential

Danger of a deadlock between police and magistracy if latter were uncontrolled by executive

Furthermore, it is not merely enough that the magistracy should not be biassed in favour of the accused, but it is requisite that they should not be indifferent to the escape from punishment of the guilty Under the present system this attitude of in difference is held in check only by the supervision and support of the district magistrates

But there would be a still great danger in the complete divorce of the magistracy from executive responsibility During the late unrest there was grave reason for suspecting that a good number of the subordinate civil judiciary in several parts of India were tainted with sympathy for agitation, and even if they had no such sympathy, the political and social pressure put upon them to give a political tinge to their decisions would be enormous and such as the ordinary European can hardly realise

It must not be forgotten that to release the magistracy from the sobering influence of the district magistrate, does not also release them from the political and social influences of the Bar libraries, the press, and the neighbours among whom his life is cast If in process of time, the magistracy should become hostile to the executive Government, the position of affairs would become very grave indeed Antipathy between the civil judiciary and the executive is undesirable enough, but antipathy between the magistracy and the executive would be a calamity That these are not imaginary evils are well illustrated by a piece of information for which I have good authority. One of our Berar Commission, a Mahratta Brahman himself, paid a visit during a short holiday to the Southern Mahratta country Accustomed, as he was in the Central Provinces and Berar to find cordial relations between judicial and executive officers and loyalty among the judges, he was greatly horrified to find the spirit of ill-feeling that had arisen among the judicial officers in Bombay The judges in receipt of salaries from the Government, had actually ostracised a caste fellow who had offered *pan* and garlands to the Commissioner

Calamitous effect of antipathy between magistracy and executive

47 It is idle for the separatist to appeal to English precedents, for the conditions of the two countries are totally dissimilar, and it is that very essential difference between the two countries that makes the separation of the magistracy from the executive so impossible In England there is no mistrust of the police, nor is there the slightest risk that the magistracy and the police will become antagonists In India the police are mistrusted, and even with their executive responsibility the magistracy is apt to become antipathetic to them I know this from my long and personal experience in the Central Provinces, and I have had the same confirmed by many persons who have equally long experience of their own provinces In England public opinion is strong in support of law and order, and any marked weakness of the judiciary letting loose powerful criminals on society would create a public uproar; but in India such public feeling as there is, is all on the other side Can anyone recall any important case when the accused were not Europeans or police officers, in which the native press in India do not start on the assumption that the accused is the innocent victim of oppression, in which they do not lament his conviction and jubilate upon his release? Does not everyone know that when any powerful zamindar or any prominent man is brought before the Courts, outside the circle of his personal enemies, the public sentiment is all in his favour His crime is forgotten, denied or palliated. The Indian public might in hot blood lynch a man but in cold blood they would like to see him released, all except the humble men who dread his oppression but are afraid to speak out their minds until he is safely put away in jail It must not be forgotten that it is a feature of Indian sentiment that the punishment of the criminal does not undo the consequences of the crime, and this being the case, that his punishment merely adds one more injury instead of obliterating the first one

Appeal to English precedents idle

Public sentiment in India generally favours the accused

The deterrent effects upon society if crime is punished, and the loosening of the bonds of law and order if criminals escape, are not at all realised by the vast majority of Indians That is the essential difference between England and India and that is the reason why it is impossible to set up in India a system which may work in England, but which can only work in a country where there is the strongest sentiment in favour of the law

48 But there is one more reason why we could not safely create these separate tribunals We are aliens in this country and we cannot entrust the uncontrolled administration of criminal law to persons who may be or might at any time

Political reasons for not creating separate tribunals

become disaffected towards our government in this country. Can anybody doubt that a magistracy removed from all executive supervision would be more likely to become disaffected than a magistracy working in close co-operation with the District Magistrate? The anecdote that I have told of the judges in the Bombay Presidency is an apt illustration of the truth of my contention If such a situation should arise what incalculable mischief might be done before it could be rectified? The evil would necessarily be gradual and insidious, and it would have to become very pronounced before any drastic action could be taken The drastic action would have to be a sort of Pride's purge applied to the magistracy, and a complete reversal of the whole separation policy Verily prevention is better than cure Can we afford to neglect the warnings of so many of the most eminent administrators in India, and in favour of what? In favour of a cry of the Congress sandwiched in among other cries for self-government on the colonial system, permanent settlements, and the repeal of the Arms Act

What sense of responsibility can be attached to the men who at a recent public meeting in Calcutta tacked on a resolution for the separation of judicial and executive functions, to a condemnation of the Privy Council and of the judges who had heard the Midnapur appeal, and to a resolution commending the services of Mr K B Dutt whose conduct had been described in severe terms to be grossly unprofessional both by the law officers of the court and by the judges who heard the appeal

Why is separation specially recommended for Bengal?

49 One last point before I conclude this chapter

Why is it that even the most prominent separatists limit their recommendations by saying that in several parts of India separation would be unsuitable, but that it is suitable in Bengal? If it is inadvisable in some places why is it inadvisable? The only suggestion is that it is inadvisable in any place because it would weaken the authority of the executive If it would not weaken the authority of the executive then why it would be inadvisable anywhere? But is Bengal such an abode of tranquillity that it is the only place in India where the power of the executive can safely be weakened? The examination of criminal statistics made by Mr James Munro contained in the appendices to Chapter IV, the analysis made by Sir John Hewett in his note contained in the appendices to Chapter V, the description of Bengal as given by Sir Herbert Risley himself, all afford a complete refutation of this argument Calm reflection should show that a reform of this kind is most required where abuse of power is most likely to occur Now where is that abuse most likely to occur? Cases of abuse would surely be likely to occur where there are fewest lawyers to check the executive, where the people are too poor to have ready access to the High Courts, where there is the least publicity, the feeblest public opinion, and where the press is least strong and least vigilant These are the places where a possibility of abuse of the union of powers is most to be apprehended Yet these are the very places which the separatist is most ready to exclude from his scheme In Bengal every condition is most favourable to the check of such abuses It swarms with lawyers, it swarms with newspapers, nothing can be done in secret; the press is very vocal, the slightest slip on the part of the Magistrate is proclaimed loudly all over the country Where then are the conditions that render this so-called reform so pressing? But further than this, Bengal is the Province where powerful zamindars are under least restraint, where crime is rampant, and where political pressure is most readily exercised, and where, as we can judge from the arguments of Sir Herbert Risley and Sir Edward Baker, even under the existing system the Magistracy has a bias in favour of the accused It is the Province where it is as difficult for a rich man to be convicted as it is for a rich man to enter the kingdom of heaven Is this the place where we should initiate experiments which may prove disastrous to our executive authority?

My Hon'ble Colleague, Sir Guy Fleetwood Wilson, even though he was writing at a time when he had a very short experience of India, was struck with this incongruity and queried whether if the experiment were made, it should not be made in some other province than in Bengal

I can only advise the Council with all the earnestness of which I am capable that of all the Provinces of India, Bengal is the least suitable for introducing an experiment and tampering with the present system Sir Edward Baker felt this when (with the chance offered him of introducing this scheme of which he was three parts the author) he faltered, drew back and feared to incur the responsibility of Frankenstein

Bengal the province least suited for any experiment

The postponement for two or three years was a weak apology on the ground that the conditions of unrest prevalent in Bengal were transitory But the unrest was the manifestation of powers and forces which might at any time break out again What is the good of a system which would only be workable as a fair weather scheme and which must be pronounced unsuited for storms and tempests? Yet Sir Edward was so fully committed by his previous advocacy that he clung piteously, against his better judgment, to the asseveration that the executive would be strengthened and not weakened by the change. A more palpably erroneous statement has never been made by an administrator of such eminence But his voice was a voice crying in the wilderness, and he was himself afraid of the sound of it In fact the cry for separation is based upon a succession of misstatements and fallacies, and upon the assertion of the existence of evils which were never serious and have passed away It is a cry made for political reasons with the avowed object of weakening the executive and of furthering the Vakil Raj It is couched in misleading phrases with intent to catch the support of a gullible British public If it were conceded it would create in every magistracy a miniature High Court without the restraint of commonsense and responsibility, which experience imposes upon that august tribunal, but with the added disqualification of a liability to political and social pressure from which the Judges of the High Courts are immune

The whole machinery of criminal administration of this land depends upon that union of functions whereby the District Officer can check the police or any powerful and influential man from oppressing the people, and can also check the magistracy from any anti-executive bias and protect and support them in resisting the hundred influences that may be brought to bear upon them As was well remarked in one of the opinions To fulfil the imaginary position of impartiality assigned to the separated Magistrate by the separatist, the Magistrate would need to be blind and deaf, and should have no relatives and friends The District Magistrate is not the travesty of himself which the separatist would depict, and to remove his wise and impartial control over the subordinate magistracy would be to remove from them the one counterpoise that there is to the sinister influences to which they are subjected and before which they are bound without such counterpoise to succumb.

CHAPTER X

Recommendations

Position to be explained to Secretary of State

50 We are greatly handicapped in deciding upon the action to be taken by the premature announcement in Council made by Sir Harvey Adamson before the case had gone to the Secretary of State, but we must not be compromised by an error with which the present Government of India has no concern, and we must lay before the Secretary of State the position as it stands today We must inform him that his scheme of separating District Magistrates and not carrying down the separation to Sub-Divisional Magistrates and subordinate Magistrates merely surrenders the citadel and retains the out-works That it does not meet the desires of the separatists, that it merely sets up a fatal system in which the whole of the magistracy will have to serve two masters, and that it will involve very heavy expenditure without even the solitary advantage of allaying agitation but rather with the disadvantage of much added friction.

The scheme previously submitted met with no real support

We must then show that Sir Edward Baker's and Sir Harvey Adamson's scheme previously submitted met with no real support It was unfavourably criticised by the High Court who spoke of their strength having to be largely increased if their administrative work were increased, who predicted that the scheme would lead to friction, and who objected to the one little safeguard imposed empowering the District Officer to call upon the Chief Magistrate to depute a Magistrate for local enquiry It was objected to by the separatists because the Magistrates were not to be placed solely under the Judge and appointed by the High Court, and because they desired further to curtail the preventive action of the District Officer It was objected to by nearly all those consulted who said that Sir Edward Baker's proposals to have non-coterminous Sub-Districts for executive work and separate Sub-Divisions for Magistrates would cause much confusion and inconvenience to the public The scheme when shorn of the extension of the separation to Sub-Divisional Magistrates, as suggested by the Secretary of State, loses nearly all its advantages from the separatist's point of view, and will not satisfy the agitator, while it will have all the disadvantages of setting up two authorities at Head-quarters to whom all the magistracy will owe a divided allegiance

How should new posts of Chief Magistrates be filled ?

Finally, no attempt is made to think out the way in which the new posts of Chief Magistrates should be filled Is it to be by young and inexperienced Magistrates who can be stationary, or by slightly more experienced officers always liable to be called away to act as Collectors or Judges, or by the extensive employment of senior Deputy Magistrates? In the former case it would be necessary to add largely to the superior appointments in the Indian Civil Service, ultimately an increase of at least 25 per cent as the scheme was extended universally; in the latter we would be substituting for the present control of the Collector Magistrate the control of a senior Deputy Magistrate Men fit to exercise these powers could not be found in sufficient numbers In fact, we should have to confess that there is really no practical scheme before the Government of India and the Secretary of State

Sir H Adamson's scheme should definitely be dropped

The scheme which was sent up was merely Sir Harvey Adamson's scheme, not recommended for introduction and with all the objections raised to it ignored and unanswered I recommend that we should now finally drop that scheme and all its anomalies and inconveniences

Substance of proposals to be substituted

51 I frankly recognise however that we cannot merely throw that scheme on the scrapheap and maintain the *status quo* just as if no agitation had ever existed, or as if Sir Harvey Adamson had never foreshadowed some reconsideration of existing arrangements We must point to the natural evolution of the magistracy and police which has been gradually and steadily at work under which judicial, as distinct from magisterial functions, have been completely separated;

under which the duties of the District Magistrate in connection with the police have become supervisory and advisory and have severed themselves from the investigation and detection of offences, under which the District Magistrate has withdrawn so greatly from the actual trial of offenders, and we must show ourselves ready to advance and accelerate any action which will remove from the magistracy any tendencies to prejudice or error, or any tendency to put undue pressure upon subordinates, conscious or unconscious, which may still exist, or which if they do not actually exist, may give colour to reasonable apprehensions or erroneous impressions throwing suspicion upon the complete independence of the Magistrates *quoad* the particular case before him, as distinct from his general liability to advice, guidance and correction in respect of defects of procedure, lack of diligence or of sense of proportion in weighing evidence or in determining sentences which examination of his criminal records may disclose

District Magistrates should be absolved of *mala fides*

52 In the first place, we may acquit our District Magistrates entirely of any want of *bona fides* If at any time an individual case of *mala fides* should arise, it is in the same category of exception as corruption or dishonesty which might be found in any walk of life and from which not even a completely separated judicial service would enjoy absolute immunity Excluding such exceptional cases and any cases of indiscretion which are inseparable from human infirmities that affect executive and judicial alike, we can fairly endeavour to eliminate causes due to ignorance of law by insisting upon the better judicial training of our Civil Servants I am one who lays the greatest stress upon the value to an officer, no matter what may be his duties, of a good judicial training A Collector with no judicial training would be a very much worse head of the police than one whose mind had been trained in judicial methods One has only to compare the departmental enquiries of the police officer, the forest officer, the engineer or any departmental head with enquiries conducted by a man who has had some magisterial experience The former is apt to confuse suspicions with proofs and to fail to distinguish between evidence and hearsay The latter is far better able to weigh conflicting evidence and balance probabilities and to pay due attention to the principle of *audi alteram partem*

Better judicial training of I C S officers advocated

The better judicial training of our Indian Civilians should be the first plank in our programme Whether as a Magistrate, a Judge, a Settlement Officer, a Secretary to Government, a Commissioner or the Head of an Administration it will be invaluable to him Indeed, were magisterial experience to be eliminated from the experience of the Indian administrator, it would be a real calamity With such an improved training our Magistrates would be able to steer clearer of mistakes due to their zeal not being controlled with sufficient discretion, and any tendency to any bias would be minimised, while we should have better material for manning our judicial services

Promotion of Deputy Magistrates

Another unfounded suspicion which appears to linger is that the promotion of a Deputy Magistrate is primarily in the hands of the Collector District Magistrate, and that his prospects may be ruined by an unfavourable remark made by a Commissioner or Under Secretary to Government As far as my own experience goes this suspicion is purely imaginary In the Central Provinces the annual report on each Magistrate was first noted upon by the Deputy Commissioner with reference to the officer's ability in respect of criminal, revenue and executive work The report was then passed on to the Sessions Judge, and by him to the Commissioner From the Commissioner it went to the Judicial Commissioner representing the local High Court If the remarks of the District Magistrate as to the officer's magisterial work were unsatisfactory, there was ample opportunity for the Judge, or the Judicial Commissioner, to record his dissent These remarks (of which any unfavourable ones had been communicated in substance to the officer concerned) remained on record, but if at any time the question of the officer's promotion came up subsequently and the nature of the reports were such as to disclose some doubt of the officer's ability, honesty or diligence, it was a common practice to refer to the officer who had remarked unfavourably on the Magistrate's work to know whether any improve-

ment had taken place since The insinuation contained in Man Mohan Ghose's memorial that a Magistrate was degraded or punished by a lack of promotion, because he had failed to convict X or Y is as baseless as it is base I am not aware how far a similar procedure prevails in other Governments, but I am fully convinced that no Deputy Collector or Deputy Magistrate should be condemned, or punished for bad magisterial work, unless all the judicial authorities who had to do with his work have had the opportunity of recording their views upon it I am of opinion that this should be laid down as an axiom all over India At the same time I may point out that even if the separatists had their way, the promotion of Magistrates would still rest with the Executive Government, so that the suggestions that I have made will tend to secure the independence of the magistracy to a much greater extent than mere separation Indeed, if the District Officer were to be able to criticise the magistracy without any personal responsibility for them, and without any power to guide and caution them, he would be infinitely more prone to find fault with the magistracy than when their continued failure or defects reflected unfavourably on the proper exercise by him of his own supervising functions

All judicial superiors should be consulted before work of any Magistrate is condemned

53 These two definite declarations of policy would go far to obviate any indiscretions, or non-judicial zeal, as well as any apprehensions of the lack of independence among the magistracy, but there are a few other matters in which it is possible to purge the present system of any chances of abuse There is no doubt that every Magistrate dislikes to have his convictions reversed on appeal The appeal from the whole of the First Class Magistracy, the Sub-Divisional Magistrate and the District Magistrate himself all lie to the Sessions Judge, and this is the most valuable safeguard that the public have against magisterial errors and excess of zeal In my own experience—an experience which is confirmed by references made in the opinions on this case—the eyes of the magistracy are turned rather to satisfying the judicial scrutiny of the Sessions Judge than to gratifying the executive pleasure of the Collector. But the insistence upon this feature discloses one possible source of bias in respect of the decisions of 2nd Class and 3rd Class Magistrates which lie to the District Magistrate It is contended that if the Appellate Court is charged with executive responsibility, Magistrates of these two classes are relieved from the fear of their proceedings not satisfying judicial scrutiny I do not consider it in any way essential that this change should be made In the vast majority of these cases the District Magistrate has no previous knowledge of them, nor the slightest interest in them, and the decision of these appeals is determined strictly on the merits, and the risk of convictions being improperly upheld is infinitesimal The decision of these appeals gives the District Magistrate a good opportunity of appreciating the work of those Magistrates, and is valuable on that account On the other hand, I do not consider it essential that the District Magistrate should hear these appeals Provided that his power of calling for records, and of revision are left unimpaired, there is nothing that would please him better than to be relieved of a very tedious class of work. I would therefore relieve District Magistrates of all the appellate work as regards 2nd Class Magistrates I would have no great objection to extend this relief to the appeals from 3rd Class Magistrates, except that I think that it would be a great waste of power if we had to burden the Sessions Judge with these appeals also The Magistrates exercising third class powers are either novices learning their work, or Benches of Honorary Magistrates, and appeals from their decisions can safely be heard by Sub-Divisional Magistrates specially empowered, and in a few cases by District Magistrates.

Further amendments of the present system considered

District Magistrate should be relieved of all appellate work from 2nd class Magistrates

54 The third reform to be initiated is the withdrawal from District Magistrates of the trial of Sessions cases under section 30 of the Criminal Procedure Code In the Punjab, the Central Provinces and Burma and a few backward tracts all cases not punishable with death are triable by the District Magistrate under these special powers. It was a

Trial of Sessions case under section 30, Criminal Procedure Code, to be withdrawn from District Magistrates

necessary expedient in poor Non-Regulation Provinces and though it may be undesirable to repeal section 30 at once, our aim should be gradually to bring those Provinces into line with the regulation Provinces These cases are a great burden to the District Officers who are constantly asking to be relieved of this burden It becomes necessary, therefore, to invest senior Magistrates with these powers, but only a few can be so entrusted. Chief Courts and Judicial Commissioners dislike such important powers being entrusted to Extra Assistant Commissioners as is often necessary. The withdrawal of these special powers must be a gradual process and will involve some increase in the number of Sessions Judges, but it is a reasonable and proper method of distributing judicial work between the Magistrate and the Judge which should be pursued as a matter of policy

Gradual withdrawal recommended

The scheme of appointing Additional District Magistrates, which has been adopted in a few of the heaviest districts of Bengal, has been used as a sort of compromise, and in their despatch to the Secretary of State forwarding Sir Harvey Adamson's scheme, the Government of India expressed a short of pious aspiration that this scheme might afford a solution of the difficulties. Personally I cannot regard this scheme as other than a temporary shift which may be expedient in the very heaviest districts, but is not a measure to be recommended, for if the work of a district has become so heavy that the District Officer finds it impossible to discharge his duties as a District Magistrate, it is a positive proof that the district is too large a charge, and that more districts are wanted. Were the method to be generally introduced it would be open to the same objections as the Secretary of State's proposals of added cost, added friction and divided responsibility In every other sphere of work, forests, education, (in some cases even) police, and in Public Works there has been progressive reduction of the size of charges to meet the enormous development of work and it is idle to suppose that district charges can for ever continue unchanged however large the area and however great the increase in population The enormous and unwieldy districts which remain in Bengal and Madras constitute an administrative evil which has a great bearing on the efficiency of our Government and one which has to be met not by multiplying assistance or setting up conflicting authorities or by entrusting important work to less experienced agency, but by reducing charges to a manageable size Instead of spending large sums of money in a vain effort to conciliate an unanswerable cry for separation, it is far better to lay them out prudently in reducing the area administered as a single district to a size in which the officer responsible can exercise really effective supervision The reform is one which cannot be indefinitely postponed by the Government of India or the Governments concerned

Objection to Additional District Magistrate detailed

The size of districts in Madras and Bengal an administrative evil

55 There are yet some other points requiring attention in regard to this matter of criminal administration, and so far as my information goes they refer principally and primarily to Bengal, and Bihar and Orissa. These are the only parts of India in which territorial jurisdiction is limited to the district or to a sub-division which is as large as an ordinary district in India No administration can be fully efficient, if there is not a territorial responsibility exercised by lower grade officers as well as those of higher grades There is no area in Bengal, old or new, corresponding to the Tehsil or Taluq and in the executive charge and coterminous magisterial jurisdiction of a Tahsildar, Taluq Officer or Mamlatdar The corresponding official in Bengal is a Sub-Deputy Collector and Sub-Deputy Magistrate, but these officers are collected at the headquarters of the Sub-Division instead of each official being given a distinct territorial charge of two or more Thanas The result is that instead of criminal cases coming only to the territorial Magistrate in charge of the area concerned they are brought to the headquarters of the Sub-Divisional District, there to be distributed individually to the Magistrate who is to try them This leads to a certain picking and choosing of Courts and no doubt gives colour to the unfounded suspicion that the cases of particular accused are made over to particular Magistrates with injunctions to convict. Similarly, distribution of

System of territorial responsibility should be applied to Bengal and Bihar and Orissa

cases has to be made individually to the Deputy Magistrates at District Headquarters

Lastly in Bengal and the new Province the relations of Magistrates with the police are closer, and undesirably closer, because there is no independent agency on which the Collector can rely, and the police instead of being confined to their proper duties are charged with collecting and giving information on many points of administration which elsewhere in India are entrusted to a revenue agency. Instead of probing the actual circumstances which differentiated Bengal from other parts of India, Sir Harvey Adamson, himself having only experience of Burma, and relying upon officers who know nothing of administration outside Bengal, set himself to evolve from his inner consciousness a set of reasons which induced him to believe that there was something in the atmosphere of Bengal which would accord only with a scheme of separation The peculiar characteristics of the Bengali character which he persuaded himself were in favour of a separation scheme were just those characteristics which would make such a scheme even more dangerous in Bengal than elsewhere Separation in Bengal, or anywhere, must leave the prosecution of offenders in the hands of the executive and it should be obvious that the whole machinery of the Bengal Press, the Bar Libraries and the agitators would be turned on to creating a feud between the separated magistracy and the executive to which any points of friction in the past would be mere child's play The country would ring with the vindictive and malignant character of the prosecution launched by the Collector and with appeals to the independent Magistrates to do their duty and save the innocent oppressed from their persecutors and each acquittal would be received with plaudits and encomia on their impartiality But it is urged that the permanent settlement in Bengal is an insuperable bar to the separate revenue and executive agencies which in other parts of India control the activities of the police and enable the demands made upon them to be confined to their legitimate duties The standing answer to this plea is offered by the Benares Division of the United Provinces which is permanently settled and yet is administered, and administered quite successfully, on the same lines as the rest of that Province Added to all the difficulties which are peculiar to Bengal, the only part of India where there is no land records staff, comes the astonishing fact that in Bengal alone, where of all places the extraordinary privileges given to the Zamindars might have been accompanied by extra liabilities, there is absolutely no responsibility for the maintenance of law and reporting of crime attached to the ownership of land There is no executive headman in the Bengal village who can be brought to book if the occurrence of crime or the presence of suspicious strangers is not brought to light. In Bombay there is the Patel, in Madras the village Munsiff, in Upper India and the Central Provinces the Lambardar or Mukaddam, but in Bengal the Zamindar is neither responsible himself nor is he bound to keep a responsible agent, and the only agency to take the place of these executive headmen are panchhayets whose members are individually without the responsibility with which they are collectively charged A deliberative body of this kind is well enough to deal with corporate matters such as the expenditure of village funds or village water supply, but for definite executive acts connected with crime they are a most unsuitable agency You might just as well charge a municipal committee with the duty of administering the police as entrust a rural Panchayat to perform the functions as regard to crime of an executive headman

Improper functions attached to police in Bengal and Bihar and Orissa

Question of creating new machinery in permanently settled areas for maintenance of law and order

56 How far it is possible to retrace our footsteps and to set up in Bengal an administrative machinery which should have been set up a century or more ago is a point which requires the gravest deliberation on the part of the administrations concerned ; but one thing is certain, and that is that no scheme of separation can be of the slightest benefit to remove disadvantages with the root causes of which it has not even the slightest connection. Rather would it serve to aggravate a position which even with the advantages of the maintenance of responsibility in the Collector for executive and magisterial work can scarcely cope with the difficulties that surround district administration. It is to

remove the causes of these difficulties that we should bend all our energies, and not to aggravate them

Summary of recommendations

57 To sum up, the remedies which I propose are as follows —

(*i*) Better judicial training of all our officers

(*ii*) The clear announcement that no officer shall be punished for defects in his magisterial work unless the judicial authority before whom that work comes has full opportunity of expressing his opinion

(*iii*) The handing over of appeals from the decisions of second class Magistrates to the Sessions Judge

(*iv*) The gradual withdrawal of section 30 cases from district and specially empowered Magistrates in all non-regulation provinces.

(*v*) The introduction of a territorial jurisdiction system wherever a territorial system is not in vogue

(*vi*) In Bengal the further dissociation of the police from non-police branches of administration, and the creation of a separate agency for their performance

(*vii*) In Bengal action to associate the ownership of land with responsibility for reporting and preventing crime through executive headmen who are either land-owners, or the accredited agents of land-owners.

(*viii*) Generally the reduction of unwieldy districts to a manageable size

A reasonable programme of administrative reform

58 This is, I submit, a reasonable programme of administrative reform based as it is upon the removal of the individual defects by the removal, as far as possible, of the causes to which they are due The other plan started to give a concession and then to invent ingenious reasons which do not bear serious examination why this concession was specially necessary in Bengal If the system which I have sketched were adopted we should have exactly that system which Sir Thomas Raleigh favoured in his note which I have quoted in Chapter III as to the method in which District Magistrates could control subordinate magistrates without interfering with their independence

There is only one last word left for me to say It was evident from Sir Edward Baker's notes that his proposals were based not upon reasons of their intrinsic necessity but in order to stave off, by such partial concessions, even greater demands, which would, he feared, be pressed upon us from England I have heard of the proverb "give them an inch and they will take an ell," but I do not recognise the converse advice that you should yield an inch to prevent having to give an ell When it is purely a case of political advance, reasonable in itself but prematurely demanded, it may be prudent to give an inch at a time and not to give the whole ell at once, but when there is no occasion for giving either the inch or the ell, when we are being asked to play havoc with our system of administration, when the evils complained of, if they were anything but imaginary, have diminished, are diminishing and will continue to diminish, when we can take reasonable action without destroying our system to prune from it any defects or weak points which may give rise to the slightest suspicion, just or unjust, it would be wrong, nay criminal, to surrender to clamour against our own convictions We should maintain those convictions finally against all attacks, and if the changes which we fear should at any time be forced upon us, it should be in defiance of all our protests, and not as a mere extension of our weak and faltering acquiescence Let the responsibility for those who force those changes upon us rest not upon us but upon those who force it Let it be not upon us but upon the heads of those who force us, the responsibility of introducing a ruinous and expensive system which is bound to be fraught with calamitous consequences to the welfare of the people entrusted to our charge.

S G P I, Delhi —No 168 H. D.—22 8-13.—N N B

R H. C[RADDOCK]

15-2-1913.

POSTSCRIPT

Since my note was written and while it was being seen through the Press, there has been a debate in the Legislative Council on the motion of Mr Surendra Nath Banerjee that a grant should be given to enable local Governments to make an experiment with the separation in selected areas Under the guise of a Financial Resolution an opportunity was given to the Council to discuss the merits of the case It was however an entirely one-sided presentment of the case as my hands were tied in the matter I could not explain the state of the case without committing myself either to an agreement with Sir Harvey Adamson's pronouncement, or committing my colleagues to a disagreement Under no circumstances could I find it possible to agree with Sir H Adamson, nor had I the authority to commit any of my colleagues to a disagreement In these circumstances the motion had the support of many who either had no pronounced views on the subject, or who gave views without hearing the other side of the case.

They embarked upon the debate on the not unnatural supposition that after Sir Harvey Adamson's own voluntary pronouncement, the financial motion could not in any way embarrass the Government. Several of them have no desire of their own to have separation, a few to my knowledge are against it, but the theory of it is thought sound, and they have no idea either what it would cost, or what consequence it would entail They merely ask for an experiment This has been the great mischief of Sir Harvey Adamson's unfortunate utterance which went entirely beyond the Order in Council Sir H Adamson did however safeguard himself by the following remarks —

> "It is a very easy matter to propose as an abstract principle that magisterial and police functions should be separated, but in the descent to actual details the subject bristles with difficulties A solution has been attempted, and it is being sent to the two local Governments for criticism It is desirable that it should be submitted to the criticism of the public at the same time But in doing so I desire to state clearly that the tentative solution is not a final expression of the decision of the Government of India, and that it is merely a suggestion thrown out for criticism with 'the idea of affording assistance in the determination of a most difficult problem"

I think therefore that if after reading my note my Hon'ble Colleagues agree, as I hope they will do, to prefer the recommendations in my last chapter to any scheme on the lines of Sir H Adamson, it is I think open to them to say that while they cordially support the principle that Magistrates deciding cases should not be influenced by external consideration and that their independence should be affirmed, that the tentative solution put forward by Sir Harvey Adamson has been found to be impracticable, and that the safeguards laid down in the last chapter of this Note will secure that independence without the large expense and the complete disorganization that separation of functions would entail. In fact that while independence of the Magistracy was the accepted goal, the particular method suggested of separation, was not the method of securing that independence which the Government could approve, because it was open to so many other disadvantages, financial and administrative, and because the independence of the magistracy was so well recognized already under the existing system that the addition of a few administrative safeguards would serve to remove any legitimate suspicion that might still (unjustifiably as the Government thought) linger The evil previously supposed to exist was a vanishing and not a growing one, and no such heroic remedies as those desired by the advocates of the separation were required to remove its last traces

R H C[RADDOCK],—21-3-13

S. G P I, Delhi—No 296 H D.—2-4-13—00—R. S. W.

Appendix I.

Mr F J Halliday in 1838

6 "The first and most prominent defect of our system I take to be the union of executive with judicial functions in the Magistrate 'There is no more important principle in jurisprudence,' says a late writer on this subject, 'than the separation of the judicial from the executive ministerial functions' The truth of the proposition is almost self-evident If a law were to be made for uniting the duties of Judge and Sheriff, of Justice of the Peace and Constable, in the same individuals, it would not only be found impracticable to perform them properly, but the very attempt would produce the most ridiculous confusion Such a scheme would certainly be scouted as absurd, as well as mischievous But many of our readers are not perhaps aware that, at this time, the functions of the Constable, or Executive Officer, are actually performed by the Police Magistrate, to a considerable extent Much of the Magistrate's time is occupied in advising and directing the Police Officer in getting up evidence,—in shaping cases upon which the same Magistrate afterwards commits for trial, or summarily convicts The Magistrate hears an *ex parte* statement upon that statement he issues his warrant, or summons to bring the offender before him When the case comes on to be heard, there is perhaps not sufficient evidence to justify a committal, or bring the offence within some Act of Parliament The prisoner is therefore remanded for further examination, with probably an observation from the bench, that a week in gaol will at all events do him no harm, and the Magistrate thereupon instructs the officers what evidence should be hunted up in the meantime The Police Magistrates, however, do not seem to be always so successful in obtaining the testimony they desire, for prisoners are remanded not once only, but twice, thrice, and oftener This practice, which subjects persons to the misery and contamination of a gaol before there is any evidence of their guilt, is much to be deprecated, but the gist of our present objection is to the interference of the Magistrate in getting up a case, in which he himself afterwards acts judicially, either by committing for trial, or summarily convicting We hold that a Magistrate ought to have no previous knowledge of a matter with which he has to deal judicially, and that his functions ought not to exceed those constitutional duties which the existing law defines clearly enough, *viz*, the conservation of the peace, by requiring sureties, according to the terms of the commission, the investigation of offences for trial, and committal of the offenders, the exercise of the power of summary jurisdiction under special statutes, and that of the judicial function at quarter sessions We therefore entirely concur in the opinion expressed by several intelligent Magistrates, that the whole executive duty of preventing and detecting crimes should be thrown upon the Metropolitan Police, and

Sir Frederick Halliday in 1856

"49 There is, however, an opinion which has found favour with some persons of just weight and authority in matters of this kind, and which has indeed a certain plausibility which tends to recommend it to many, and especially to those whose experience or whose mode of thinking has been derived from European rather than from Oriental habits, against which I am especially desirous of raising my testimony in this place—the rather, perhaps, that in the days of my smaller experience I myself have held and advocated the opinion, which I now very heartily condemn The opinion to which I allude is this, that Magistrates of every degree should be debarred from all judicial powers, and should have nothing but the executive duty of preventing and detecting offences, and that separate judicial functionaries should always receive and try cases of every kind committed to them by the Magistrates of various degrees Thus it is I believe contemplated by some advocates of this system that at or near every place at which a Deputy Magistrate is stationed, there should be a Munsiff, a Sadr Amin, or a judicial officer of some corresponding class to try all cases sent to him by the Deputy Magistrate, and that in the same way all cases coming before the Zillah Magistrate, whatever their nature and importance, should be sent for trial to a judicial officer at the zillah station, Native or European

"50 It is one very serious objection to this scheme, that it will be very expensive, —not unlikely, as I believe, to double the proposed additional charge But I think this the smallest objection to which it is liable It is a scheme foreign and unintelligible to Asiatic notions, and altogether founded on European ideas and habits, going indeed in its excessive provisions to a degree even beyond any general European practice

"51 I am very sure that our mofussil administration will *cæteris paribus* be generally efficient, while it is certain to be also acceptable to the people, according to the degree in which it conforms to the simple or Oriental, in preference to the complex or European, model The European idea of provincial government is by a minute division of functions and offices and this is the system which we have introduced into our older territories The Oriental idea is to unite all powers into one centre The European may be able to comprehend and appreciate how and why he should go to one functionary for justice of one kind, and to another for justice of another kind The Asiatic is confused and aggrieved by hearing that this tribunal can only redress a particular sort of injury, but that, if his complaint be of another nature, he must go to another authority, and to a third, or a fourth kind of judicature, if his case be in a manner incomprehensible to himself, distinguishable into some other kinds of wrong or injury He is unable to understand why there should be more than one *hakim*, and why the *hakim*, to whom he goes, according to his own expression, as to a *father*, for justice, should be incapable of rendering him justice, whatever be

the Magistrates be confined strictly to the passive adjudication of the cases which the Police might bring before them The catching the thief and getting up of evidence against him in the first instance might, in an improved state of the criminal law, be delegated to a particular department of the Police, in the same way as in a later stage of the proceedings it ought to belong to the office of public prosecutor "

7 These remarks were written for England, but they apply with double force to this country In England a large majority of offenders are, as here, tried and sentenced by the Magistrates, but in the former country the cases so tried are comparatively of a trivial and unimportant nature In India the powers of the Magistrates are much greater, their sentences extend to imprisonment for* three years, and their jurisdiction embraces offences which, both for frequency and importance, are by far the weightiest subjects of the criminal administration of the country

* By Regulation II of 1834, Magistrates with full powers were authorised to award one year's imprisonment in lieu of corporal punishment

the nature of his grievance, or whatever be the position of his adversary

"52 Accordingly, not only in all our recent acquisitions, such as Scinde, the Punjab, Burmah, Nagpore, Oudh, but in most of those which date thirty and forty years further back, such as the Nerbuddah territories, Assam or Arracan, we have carefully framed our administration upon the Oriental plan, modifying it only where absolutely necessary to ensure real benefit to the people And while Europeanized methods of our oldest territories have been notoriously unsuccessful, the result has, on the whole, been so decidedly favourable in the newer districts, that no sound Indian statesman would now dream of proposing for any new acquisition any other plan of administration Nothing can be more opposed to the Oriental plan of administration than the entire separation of judicial from executive duties, which is advocated by the overmuch occidentalists to whom I have alluded, at the same time that it is going backwards from the course which experience has been gradually forcing upon our older territories ever since 1793 In that year the 'regulation system' began by denuding Zillah Magistrates of almost all judicial powers But this was soon found to be practically intolerable, and first in 1807, and afterwards at different intervals, the judicial powers of Zillah Magistrates were increased from infliction of one month's imprisonment to that of six months, one year, two years, and ultimately three years, which is the limit of judicial power now exercised by Zillah Magistrates I know that the general opinion of the most trustworthy officers is that if the Magistrates were not so young,—that is, if by union of the office with that of the Collector, or in any other way, the age and experience of the Magistrates were raised to its former standard,—it would be wise to increase (instead of diminishing) their judicial powers, and to give them, as is given to Magistrates in several of the 'non-regulation' provinces, a power of sentencing to imprisonment for as many as seven years, subject only to the revision of a higher authority This was recommended by Mr Dampier in his Police Report for 1848 for all cases of simple dacoity.

"53 Before 1830, the trial of heinous cases in each zillah was by Circuit Judge, who came at stated intervals, tried such cases as he found ready, and departed, to be succeeded on the next circuit by a different, and again at another interval by a third, and sometimes even a fourth, Circuit Judge Among some evils peculiar to the system as it then existed, there was undoubtedly much that operated with advantage in these successive circuits by successive Judges That system has been succeeded by one in which each zillah station has its permanent Sessions Judge And though this change effected an undoubted remedy for some of the more obvious evils of the previous system, it has been found in practice to be open to certain special objections, such as have been thought by many almost to counterbalance its admitted benefits For instead of the little known, and therefore the more honored, Circuit Judge, we have now a Judge who, in a small station and a confined society, must of necessity be in such a degree of close and incessant intercourse with the

8 The evil which this system produces is twofold it affects the fair distribution of justice, and it impairs, at the same time, the efficiency of the police

9 The union of Magistrate with Collector has been stigmatized as incompatible, but the junction of thief-catcher with judge is surely more anomalous in theory, and more mischievous in practice So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy —the danger to justice, under such circumstances, is not in a few cases, nor in any proportion of cases, but in every case In all the Magistrate is constable, prosecutor, and judge If the appeal be necessary to secure justice in any case, so in it must be all, and if—as will follow—all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance

Magistrate as usually breeds the familiarity which is proverbially destructive of respect. Small societies too are liable to jealousies, scandals, quarrels, over-friendships, over-enmities, and in all these, to the detriment of his official usefulness and his judicial dignity, the Judge is not seldom found to bear a part Sometimes the Judge and the Magistrate are in open enmity, and then every counter-decision is apt to be attributed by their keensighted Native observers to the existence of ill-feeling between the two functionaries As often, perhaps, the Judge and the Magistrate are in close intimacy, they dine together, they ride together, they shoot or hunt together, their tastes and feelings are obviously in unison, and then every judicial affirmation of commitments and appeals is liable by narrow-minded and interested by-standers to be put the account of friendship and influence In one zillah the Judge perhaps is weak, and exercises feebly and ineffectually the control over the Magistrate which the system expects of him In another zillah the Judge may be vigorous, encroaching, overbearing, and then the Magistrate is made a cypher, and his power, without his responsibility, passes into hands for which it was never intended No one who is familiar with the state of the interior will deny that amidst much that is good, our present system is often marred by one or other or all of the evils I have above depicted, and these evils, wherever they occur, arise undoubtedly from the antagonism of a locally opposed judicial and executive authority But conceive this local antagonism, not merely at each zillah station, but all over every district, and the antagonism in each case, not of two liberally educated Englishmen, but of two half-educated and Orientally civilized Natives—and let those who know the country and people declare what would be the practical result Conceive every darogah opposed perhaps to an antagonist local Munsiff, and every Native Deputy Magistrate to a Native Sadr Amin at an out-station — imagine the bickerings, the criminations, and recriminations that would ensue! For though under the greatest provocation corruption is the last thing which a Native ever imputes to an English Judge or Magistrate, it is the first imputation which a Native casts on a Native on great provocation, slight provocation, or no provocation at all Thus, in but too many instances, would executive officers account for every failure by insinuations against the judicial department, and thus as often would the judicial functionaries retort by insinuations against the purity of the executive ! At the best, all the difficulties and embarrassments, which even now not unfrequently impede the administration owing to divided authority at the chief zillah stations, would be multiplied a hundredfold If it were asked why crime had increased in a given district, the executive officers would reply—'Because of the pertinaciously unreasonable acquittal of all our criminals by the judicial functionaries' If the judicial functionaries were in any way questioned for this result, they would answer—'It is because of the negligence and inefficiency of the executive' Nobody would be responsible Power would be everywhere divided, and everywhere contending against

10 It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time, that which is devoted to matters strictly executive being only the short space daily employed in hearing thana reports But the effectual management of even a small police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the police of a large district must necessarily be inefficient which, from press of other duties, is slurred over in two hasty hours of each day

11 I consider it then an indispensable preliminary to the improvement of our system, that "the duties of preventing crime and of apprehending and prosecuting offenders should, without delay, be separated from the judicial function, and for this essential improvement the amendments of the Report do not provide"

power The administration of the interior would be torn asunder, and the result would be good made bad, bad made worse, and confusion everywhere worse confounded No one who has the personal acquaintance with the interior, which my present position no less than my past experience has given me, can say that this anticipation is exaggerated All must agree that the mischiefs I have anticipated would, under such a system, be very likely to break out

"54 I believe that to deprive our Magistrates of judicial power, while it would degrade them in the eyes of the Native community, who can never understand why when the *hakim* has caught a thief he should not forthwith try and punish him, would take away a great cause of self-respect from the executive functionary and a great means of self-improvement I have no doubt that the sense of judicial responsibility has a very large and important effect in raising the character and improving the conscientiousness of our executive Magistrates, while it certainly adds greatly to their useful influence among the people, and I am satisfied that justice is not likely to be less truly or satisfactorily administered under the present system, which entrusts large judicial powers to Magistrates and Deputy Magistrates, than under a system which, taking away from them all Judicial power, should make them in their own view, and in the apprehension of the people among whom they act, nothing but a higher kind of police darogahs

"55 In recommending therefore a considerable addition to the number of Deputy Magistrates, I would be understood to advocate very strongly that they should, as at present, be permitted to exercise judicial powers, varying with their known qualifications and experience, and subject to revision by a higher authority This is in perfect accordance with the recommendations of the recent Report of the Law Commissioners"

Appendix II.

Separation of Judicial and Executive Functions

A reference to my note of the 12th April last will show that this question was initiated by a Memorandum* written by the Hon'ble Mr Ilbert, handed to me by His Excellency the Viceroy with a request that I would note on certain proposals made in it regarding (1) the present system of summary trial, (2) the separation of judicial and executive functions, and (3) the extension of trial by jury I brought together all the information that was readily available on these subjects, and as regards summary trial and trial by jury, I gave in fact everything there was to be found in our records I understand that no further steps are now contemplated in respect of those two matters But in regard to the third question—separation of judicial and executive functions—owing to a want of precision in my instructions, I had not, it appeared, covered the whole ground which Lord Ripon wished to see reviewed (What I did say will be found at pages 30—34 of my former Note) It was, therefore, arranged to get Mr Quinton's assistance, and have a complete examination of the records made from the mutiny to date, and to supplement this by demi-official confidential enquiry from Local Governments, so as to bring together all that could be said on the subject of *the relations of the Magistrates to the Police,* which it appeared was the branch of the question to which His Excellency attached most importance

* I have no copy of this Memorandum or of the Hon'ble Member's remarks on my note of 12th April These papers went to the Viceroy and never came back

2 Mr Quinton in his note below has traced at great length the successive changes in the law and practice regulating the relations of the Magistracy and the Police, and in Chapter VI, he reproduces the results of his references to local Governments, and gives his own opinion in the following terms —

> The existing system of magisterial and police administration has slowly attained its present shape, through a succession of legislative and administrative measure spread over a long period of time and brought into operation as the circumstances of the country called for them
>
> The report summarised in this chapter appear to me to show conclusively that an alteration in the law respecting the union of police and magisterial functions in the same officer to the limited extent to which it is now authorized is neither necessary nor desirable The executive officers consulted are a most unanimous as to its successful working and as to the need for its continuance The High Court of Madras pronounce it to be "necessary and salutary," and under the administrative conditions of that Presidency, "essential," the High Court of the North-Western Provinces considers it to be "proper and fit," the High Court of Bombay has never made any unfavourable comments on the system, and even in Bengal, where the greatest exception is taken to it by the Press, only four cases are to be found in the Law Reports of fourteen years in which its (*sic*) abuses of it were animadverted on This evidence falls very far short of establishing grounds for tampering with the functions of so vital an organ of the administrative structure as the District Officer And even were the abuses in Bengal much more numerous and much more grave than they are, it would not be wise to legislate for the whole empire on account of cases which are confined to a single province
>
> It is agreed on all hands that the control and direction of the police by the District Magistrate are indispensable, while there is very weighty authority for the proposition that the District Magistrate could not be deprived of his judicial functions without seriously impairing the influence and respect now attached to his office—the mainstay of our administrative system,—and it is certain that no measure of the kind could be carried out without great expense and, in many provinces, loss of efficiency The control over police enquiries in particular cases exercised by Subordinate Magistrates is strictly regulated by law, and to the provisions of the law on that point no valid objection is shewn to exist

This is precisely the conclusion already expressed in my note of April, and is in accordance with the opinion held by the great majority of considerable Indian authorities, who have examined the subject

3 Mr Quinton mentions in the concluding paragraphs of his note a few points on which executive orders might, he thinks, possibly be useful —

1st —He thinks local Governments should be told that District Magistrates ought not to be pressed to take up judicial work, and should only be expected to undertake it when the smallness or incompetence of the district staff renders this necessary

2nd —He thinks Magistrates might be told not to try cases in which they have been personally concerned in bringing offenders to justice This instruction is designed to supplement Act III of 1884, which entitles the accused, in cases taken up by a Magistrate under section 191 (c) of the Code (*i e*, upon information privately received, or upon his own knowledge or suspicion), to claim transfer to another Magistrate or a trial at Sessions

3rd —He thinks Subordinate Magistrates at head-quarter stations should not review and pass orders on the police diaries referred to in Section 172, Criminal Procedure Code, until the police enquiry is completed, but he would allow Sub-Divisional Officers to direct and control the police

4th —Magistrates should, he thinks, be charged to exercise great caution in trying cases initiated by themselves under Section 191, Criminal Procedure Code

4 I believe that any one acquainted with mofussil procedure who has read Mr Quinton's Note will see that Mr Quinton did not feel himself so much pressed by the importance of his recommendations as bound to make *some* proposals after such a prolonged enquiry, Curiously enough the only suggestion of real importance—the third—is one in which Bengal

experience would lead me to differ from him I think the cardinal principle that *none but the District Magistrate* should exercise any controlling and directing authority over the Police should be maintained There is no real necessity for giving Sub-divisional Officers this power Our Sub-divisional Officers in Bengal get on perfectly well without it Let the law on this point be upheld There is really, I submit, no case whatever made out for modifying the existing system as laid down in the Code The North-Western Provinces and some other Governments have departed from this cardinal rule, and should be brought back to it Beyond that nothing is practically required, though there is no harm in any of Mr Quinton's other proposals

5 I had kept this case back under Lord Ripon's instruction, and His Lordship has now sent into Office a Minute on the subject I regret to find that what I had written above is directly in conflict with his Lordship's views, and I had no opportunity of discussing the question with him orally I shall not attempt to argue the question with His Lordship on paper It would be unseemly were I to do so The Honourable Member and his colleagues, with the new Viceroy, must form their own judgment on the ample material now before them What I had to submit regarding the undesirability of re-opening the Criminal Procedure Code is said in my former Note

6 If the District Magistrate loses his judicial powers, the centre of gravity of the district administration will be altogether shifted He will cease to control and supervise the junior Magistrates, a duty which he can now very effectively perform In those provinces where he tries few original cases, he is quite the best available supervising agency and appellate authority for petty cases The appeals in petty cases will have to go to the District Judges, if the District Magistrate is to lose judicial powers The supervision of the subordinate magistracy will also have to be made over to the Judges, who are not (as the District Magistrates are) peripatetic officers, and are already hard enough worked The supervision will be worse done and often not be done at all We shall certainly have to increase largely the District Staff in those provinces where the District Magistrate still takes a fair share of the original work Nevertheless the District Magistrate will still have to remain the official superior of the subordinate Magistrate, but he will be converted into a Police Officer pure and simple He will be restrained in his desire for conviction by no sense of judicial propriety as at present, and if he wishes or cares to influence his subordinates unduly in their judicial capacity, he will be in a better position to do so The last state of things will be worse than the first Moreover every man who has been a District Officer knows that if he had not been the acknowledged head of the District Magistracy, his influence as a District Executive Officer would have been most seriously impaired It is not the fact of trying cases that gives the District Officer his position in the eyes of the Natives, but the knowledge that he *has* the power, and can take cases away from his subordinates, and control their operations, that he is in fact the Chief of the district staff

A[LEXANDER] MACKENZIE],—13-12-84

The Honourable Member has suggested that I should note on this matter, and as it relates to a system in the practical working of which I was actively concerned for many of the best years of my life, I do not hesitate to do so

2 I agree with Messrs Quinton and Mackenzie and the great mass of authorities behind them in thinking that no radical change in the present system is either desirable or practicable, and that the most we can do is to make from time to time such modifications in matters of detail as may seem necessary to guard against the abuses to which that system like every other system in this world is occasionally liable

3 The late Viceroy in his Minute of the 10th November last proposed to go much further I desire to say as little as I can regarding a paper which until three months ago official discipline would have placed above criticism from me, and which even now official courtesy requires me to treat with the utmost respect, but I find it impossible to deal with the subject adequately without making a few observations on what Lord Ripon has said, especially as he seems, probably owing to his having written hastily on the eve of his departure, to have proceeded on imperfect information and without quite foreseeing the practical consequences of what he has proposed

This view is, I think, correct Lord Ripon informed me he had put up a note just to show his own ideas on the subject, but he admitted the result of the enquiry did not prove what he expected He never had time to consult with me

J G

4 As I understand his Minute, he desires (paragraph 5) to have the principle "acknowledged" that the cumulation of criminal judicial and executive (by which he means chiefly police) powers in the same person is liable to lead to serious abuses, and that a complete separation of the two should be effected He considers (paragraph 4) that with a view to carrying out that principle, the District Magistrate should be deprived of his criminal judicial powers including (as is quite clear from what he says about the Nuddea students' case in paragraph 3) his appellate and controlling powers over the Subordinate Magistrates' Courts, and he is under the impression (paragraph 4) that if this was done, little more would remain to be done to carry out the principle in question

5 Now as regards the point whether the principle should be "acknowledged," I don't think I need say much, for I feel confident that whatever the views of the Government of India may be on the general question, they will not in these days of agitation among a certain

class of the people attempt to formulate them Even if they made up their minds to abolish the judicial powers of the Magistrate of the District, and thought with Lord Ripon that that would practically give full effect to the principle, they would consider it wiser not to indulge in any enunciation of abstract theories But further, as I shall presently show, Lord Ripon is under a misapprehension in supposing that the abolition of the District Magistrate's judicial powers would practically give full effect to his principle The combination of police and judicial powers pervades our criminal system throughout all its lower grades and could not be got rid of except by administrative and financial changes of a most extensive kind, which it is absolutely certain could not be carried out in this generation Any acknowledgment of the principle would accordingly be an acknowledgment that our system is defective and open to serious abuses in particulars which we are powerless to remedy, and that is a sort of acknowledgment which we will scarcely be so unwise as to put forth For these reasons I shall not enter at large upon the question of principle, but I may be permitted without disrespect to make one observation on Lord Ripon's treatment of it

6 It will be noticed that the opening portion of Lord Ripon's Minute is clearly intended as an answer to Sir J Stephen, whose defence of the present system was quoted in paragraph 25 of Mr Mackenzie's note of the 12th April 1884 Sir J Stephen, it will be seen, being given to philosophizing on such subjects, put forward certain general remarks of a theoretical nature to account for the fact that the union of executive and criminal judicial functions was felt to be desirable in this country, and Lord Ripon taking hold of this treats the view of Sir J Stephen and those who think with him, that is to say, almost the entire body of Indian administrators, as a mere philosophical theory against which he can set his own philosophical theory, but I need hardly observe that it is nothing of the kind The general run of Indian officials outside the Secretariats are not given to theorizing, and Sir J Stephen, though he had a turn that way, was one of the most practical men that ever came to this country

The ground of their conviction was the plain and practical one that if you deprive executive officers of their criminal powers, you detract enormously from their strength, and that as they are the back-bone of Indian administration, you will probably have a breakdown all round It may, of course, be contended in answer to this, that it is not desirable to have executive officers so powerful, that we might find something better to substitute for them, or that an invertebrate form of administration would answer very well These are possible arguments on the merits of the question into which I need not enter All I desire to insist on at this moment is that the case of those who would maintain the present system in no way rests on any philosophical theory and cannot be answered by any rival philosophical theory

7 Passing now from the general question and coming to the particular proposal which Lord Ripon makes, *viz*, to deprive the District Magistrate or head of the district administration of all criminal judicial powers, it will be seen that Lord Ripon questions the position that if we deprived the District Magistrate of his criminal judicial powers, we shall detract very much from his strength

He refers (paragraph 2) to the very small amount of criminal work shewn in Mr Quinton's note as disposed of by District Magistrates, and says he is very sceptical as to the practical importance of retaining in the hands of District Magistrates a power so rarely exercised Now I might, if there was nothing else to be said, join issue as Mr Mackenzie does upon this, and I think I could show that even the power of occasionally taking into his own hands the class of work referred to is by no means an unimportant one, but what I desire to point out is that Mr Quinton's figures which Lord Ripon apparently took as exhausting the whole field of the District Officer's criminal powers refer only to the hearing of *original* cases, and that besides his power of hearing original cases which he only sparingly exercises, the District Magistrate has far more important powers as a Court of criminal appeal and as a Court of criminal revision which he must exercise He, moreover, has the general control and superintendence of all the criminal Courts in his district, and is, in fact, the head of the judicial criminal administration

This is, I think, the correct view The District Magistrate's original jurisdiction is seldom used, but his appellate and general revisionary powers are absolutely necessary to the good government of his district

J G

To transfer all these powers to an independent authority and thus set up a rival power in the district with which the District Officer would be constantly in collision, and which would be perpetually criticizing his proceedings, would radically and fundamentally alter the position of the District Officer

I quite agree

J G

I am quite sure that if Lord Ripon had had time to show his Minute to any one who was conversant with the details of the position and could have pointed out this to him, he would not have attempted as he has done to minimize the effect of his proposal Whether if he had understood the momentous nature of the change he was suggesting, he would still have advocated it, it is impossible to say That would depend on the view he took of the question as to the desirability of having a strong District Officer to work through, and on that question we have, as far as I know, no express statement of his opinion

Yes Lord Ripon pointedly told me his note contained only *his own* views

J G

8 There is another matter to which I wish to refer, and that is that only two years and a half ago when the Punjab Government in reorganizing their judicial arrangements put forward proposals which, perhaps owing to inadvertence, involved to some extent a change like that now suggested by Lord Ripon, the Government of India distinctly declared itself, as it had on previous occasions done, against the abolition of the District Officer's criminal judicial powers See paragraph 4 of the Home Department letter no 1463, dated 16th September 1882 (Proceedings, September 1882, no 246), where it is said—"On the other hand the Governor General in Council does not approve of the Deputy Commissioner divesting himself of the functions assigned by the Criminal Procedure Code to the Magistrate of the District, and this appears from paragraphs 18, 45, and 47 of your letter to be to some extent intended"

I would refer to the first five paragraphs of my note of 3rd August 1882, in the Proceedings just mentioned, and paragraph 2 of the Hon'ble Mr Ilbert's note immediately following as showing the grounds of this decision If will be observed from those notes that it was the criminal appellate powers of the District Magistrate which it is clear from Lord Ripon's Minute and particularly from his remarks on the Nuddea case he includes in his condemnation, that were then particularly in question

9 So much for Lord Ripon's proposal taken in itself It remains to consider the opinion expressed by him that if we could get rid of the District Magistrate's judicial powers, this would leave little more to be done to place our judicial organization on what he would consider a sound footing, that is to say, to effect "complete separation of judicial and executive functions" which appears to him to be an essential feature of a thoroughly satisfactory judicial system

I am afraid this is very far from being the case Lord Ripon seems to be under the impression that the police work at present done by Magistrates is or can be confined to District Magistrates, but even at that stage of a case when it is in the hands of the police, and has not been sent up for trial, the interference of the Subordinate Magistrate on the spot to control and guide the police is in many parts of the country absolutely indispensable to prevent abuse and miscarriage

It will be observed that Mr Quinton who is evidently anxious to effect a complete separation of the police and judicial functions at this stage admits this The matter, however, does not stop there In a very considerable proportion of cases when the police investigation stage has passed, and the accused has been sent before the Magistrate for trial, the Magistrate finds himself compelled to perform that which is properly the duty of a police officer He very often finds that the evidence is insufficient or incomplete He not unfrequently finds before he has gone far that the true aspect of ths case is something wholly different from what it is made out to be in the proceedings of the police and the evidence sent up by them, and that wrong persons have been charged, and so one What is he to do under such circumstances? To dismiss the charge and abuse the police? To throw the case back on their hands with a general suggestion that further investigation in required?

My experience quite confirms this view Even as a Sessions Judge I have had to call for additional evidence as the case proceeded.

Certainly not These are the courses taken by some indolent and worthless Subordinate Magistrates, but if they were commonly resorted to, our criminal system would very soon break down altogether

Most true—J G

What a Magistrate must do under these circumstances, and what the Code is designedly so framed as to admit of his doing is [to use Sir George Campbell's phrase (p 47 of Mr Quinton's note)] "to adopt an inquisitorial procedure," that is to say, to *"investigate"* the case, look for evidence, issue warrants of arrest and search warrants of his own motion perhaps proceed to the scene of the offence to make a local inquiry, and so on Very commonly the police work done by Judicial Officers in this way far exceeds in importance the police work done by the District Magistrate or his assistants in cases before they are sent up for trial This is of course open to the theoretical objection that the Magistrate is uniting in himself the functions of prosecutor or police officer and judge, but as will be seen from Mr. Quinton's note, it does little or no harm in practice, and anyhow, and it is on this I wish particularly to insist *we can't help it* In order to get the cases which are sent up by the police to Magistrates for trial prepared in such a way that we could afford to direct our Magistrates to take up the purely judicial attitude of an English Criminal Court or a Sessions Court or Presidency Magistrate in this country, we should require to have all over the country a staff of public prosecutors and superior police officers, composed of men of as good a stamp as our present Subordinate Magistrates, and the cost would be so enormous that the most sanguine persons could not hope to see the Indian revenue capable of bearing it in this generation or perhaps even the next For these reasons I say that Lord Ripon's proposal to abolish the District Magistrate's judicial powers would fall far short of effecting the separation of executive and judicial functions which he advocates, and that whatever may be thought of the expediency of effecting such a separation, its complete accomplishment must be postponed to the far distant future

Quite true—J G

10 Passing now from Lord Ripon's Minute to Mr Quinton's note, I have only to say that I see nothing objectionable in any of the proposals made in it, though unless we are very careful about the way we put the first of them, viz, that District Magistrates should not

be pressed to take up original work except when the smallness or incompetence of the district staff renders this necessary, there will be great risk of these gentlemen who, as a rule, extremely dislike original work, leaving in the hands of their subordinates cases of importance and difficulty which ought to be dealt with by an officer of greater judgment and experience

11 One thing I would add, and that is that as we can't do much we should do whatever we do quietly by an unpublished order and without in any way connecting it with the more ambitious proposals referred to at the time the Criminal Procedure Act of 1884 was passed, and which seem now to have nearly dropped out of sight There could be no greater blunder than to go up to the mountain top amid thunder and lightning and all the other apparatus of a new dispensation, and then come down with only a trumpery little judicial circular in our hands

D[ENNIS FITZ PATRICK],—19-3-85

To Honourable Member

With reference to this matter, I must say that a long experience in the Judicial service led me to the conclusion that the calls which the Vernacular press were making about the great injury done to the public by the practice of the Magisterial and Police powers in the same officer was greatly exaggerated

And when Lord Ripon and my Honourable Colleague in the Legislative Department were anxious either to have a Commission or a Commissioner appointed to inquire into it and to take evidence, etc , I strongly advised that such a course should not be adopted But I consented to a special officer being appointed to draw up a report from the office records, and also from information to be obtained demi-officially from Local Governments and Administrations on the points which might require clearing up from local sources Mr Quinton was appointed to the work and made a very full historical report, and the conclusion he arrived at was just what I expected and what I had predicted, and I am glad, therefore, that the more public method of Commission or Special Commissioner had not been adopted, as the result would have been rather *a fiasco*

The Vernacular papers have now dropped the subject, and I very strongly advise that no Resolution should be issued on the matter

We might communicate the proposals or those of them which it may be thought necessary to the Local Government or Administration where it is shown to need such, but I would do as little as possible, because I believe little or nothing is required

I much regret Lord Ripon had no time to discuss the subject, had he done so, I feel sure he would not have written some parts of his note

J[AMES GIBBS],—20-3-85

I have added a note or two on that of Mr Fitzpatrick, in which I generally concur

J G

Not pressing

To His Excellency—I believe this matter was discussed in Council before and perhaps Your Excellency will think it desirable to circulate the papers

D F P,—21-3-85

This file was sent to the Private Secretary's Office as ordered by the Secretary on the 21st but returned to office unnoticed, after His Excellency's departure

B A d'E,—24-3-85

Let Sir S Bayley see this meantime

A M,—15-4-85

Beyond saying that I agree generally with Mr Gibbs and Mr Fitzpatrick, I do not wish to add to the literature of this subject at present If His Excellency thinks it necessary to take any further action in accordance with the views of Lord Ripon, I should be glad to have an opportunity of speaking to him on the subject

S[TUART COLVIN BAYLEY],—17-4-85

His Excellency the Governor General tells me this may be put aside with 'No orders'.

A M,—20-7-85

S. G P I., Delhi—165 H D—5-4-13—C B—100

Appendix III.

India Office,
London, 3rd August 1899

Judicial
No 47

To His Excellency the Right Honourable the GOVERNOR-GENERAL of India in Council.

MY LORD,

I forward, for the consideration of your Excellency in Council, and for any remarks you may have to make a copy of a letter* which I have received from Sir William Wedderburn and Mr Herbert Roberts, and of the memorial forwarded therewith, on the subject of the separation of Judicial and Executive duties in India

* Dated the 10th July 1899

2 The subject is one which has no doubt from time to time engaged the attention of your Government The present memorial, with its appendices, appears chiefly to consist of materials accumulated by the late Mr Mano Mohan Ghose, of the Indian Bar, in 1896, and of various articles which appeared in the public press in connection therewith It should perhaps have been addressed to your Excellency and not to this Office, but in view of the position and services of some of those who have signed it, and of the fact that none of them, I believe, are resident in India, I think it well to forward it to you in order that you may, after due consideration, inform me of your conclusions in regard to it

I have the honour to be,
MY LORD,
Your Lordship's most obedient, humble Servant,

GEORGE HAMILTON

ENCLOSURE

House of Commons,
10th July 1899

MY LORD,

We have the honour, on behalf of the signatories, to forward, for your favourable consideration, a memorial urging the separation of judicial from executive functions in the Indian Administration

It is hoped that the expense involved will not be great, but even if the cost is considerable, the improved condition of Indian finance will, in the opinion of this Committee, justify the expenditure necessary to carry out this much-needed reform The financial statement just presented to Parliament shows that the Government of India anticipate a surplus of Rx 4,579,400 for 1898-99, and of Rx 3,932,600 for 1899-1900, also we notice that the Secretary of State has been able to sanction an increase to the emoluments of the High Court Judges This Committee therefore considers that the time is opportune for dealing with this question, and trusts that funds will be provided to place the lower grades of the judicial service upon a satisfactory footing, and give effect to a measure earnestly desired by the Indian community

We have, etc,

W WEDDERBURN, Chairman
J HERBERT ROBERTS, Secretary
} Indian Parliamentary Committee

The Secretary of State
for India

II

JUDICIAL AND EXECUTIVE DUTIES IN INDIA

To the Right Honourable

LORD GEORGE FRANCIS HAMILTON, M P,

Her Majesty's Principal Secretary of State for India,
India Office, Whitehall, S W

My Lord,

We the undersigned beg leave to submit to you, in the interests of the administration of justice, the following considerations in favour of the separation of judicial from executive duties in India The present system, under which the chief executive official of a district collects the revenue, controls the police, institutes prosecutions, and at the same time exercises large judicial powers, has been, and still is, condemned not only by the general voice of public opinion in India, but also by Anglo-Indian officers and by high legal authorities The state of Indian opinion with reference to the question is so well known as to require neither proof nor illustration The separation of judicial and executive functions has been consistently urged throughout a long series of years alike by the Indian press and by public bodies and individuals well qualified to represent Indian public opinion We propose, however, to refer briefly to some of the numerous occasions upon which the principle of separation has been approved by official authorities, next, to explain the nature of the existing grievance, and the proposed remedy, and, finally, to discuss objections which have been or may be advanced against alteration of the present system This Memorial, therefore, consists of three sections, which it may be convenient to indicate as follows —

(*a*) An Historical Retrospect (paras 2 to 10),

(*b*) The Existing Grievance, and the Remedy (paras 11 to 14),

(*c*) Answers to Possible Objections (paras 15 to 18)

(*a*)—An Historical Retrospect

2 So long ago as 1793 the Government of India, under Lord Cornwallis, recognised the dangers arising from the combination, in one and the same officer, of revenue with judicial duties Section 1 of Regulation II, 1793, contained the following passage —

> "All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their rayats or other persons concerned in the collection of their rents, have hitherto been cognizable in the Courts of *Maal Adawlut*, or Revenue Courts The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of that Board to the Governor-General in Council in the Department of Revenue The proprietors can never consider the privileges which have been conferred upon them as secure whilst the revenue officers are vested with these judicial powers Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties, it is obvious, that, if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another Their financial occupations equally disqualify them for administering the laws between the proprietors of land and their tenants Other security, therefore, must be given to landed property and to the rights attached to it before the desired improvements in agriculture can be expected to be effected Government must divest itself of the power of infringing in its executive capacity the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders The revenue officers must be deprived of their judicial powers All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of the Courts of Judicature superintended by Judges who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants The Collectors of the Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it No power will then exist in the country by which the rights vested in the landholders by the Regulations can be infringed, or the value of landed property affected."

III

3 These observations aptly anticipated the basis of the criticisms which during the succeeding century have so often been passed, as well by individuals as by public bodies of the highest authority upon the strange union of the functions of constable and magistrate, public prosecutor and criminal judge, revenue collector and Appeal Court in revenue cases In 1838 a Committee, appointed by the Government of Bengal to prepare a scheme for the more efficient organization of the Police, issued its report As a member of that Committee Mr F J Halliday (afterwards Sir Frederick Halliday some time Lieutenant-Governor of Bengal and Member of the Council of the Secretary of State) drew up an important Minute in which, after citing at length the considerations that had been urged in favour of separating police from judicial duties in London, he stated that they applied with double force to India The passage quoted with approval by Mr Halliday declared that there was no more important principle in jurisprudence than the separation of the judicial from the executive ministerial functions , that a scheme to combine the duties of Judge and Sheriff, of Justice of the Peace and Constable in the same individuals, would be scouted as absurd as well as mischievous , that a magistrate ought to have no previous knowledge of a matter with which he had to deal judicially , and that the whole executive duty of preventing and detecting crimes should be thrown upon the police In support of the proposition that these remarks applied with double force to India, Mr Halliday wrote —

> "In England a large majority of offenders are, as here, tried and sentenced by the magistrates but in the former country the cases so tried are comparatively of a trivial and unimportant nature In India the powers of the Magistrates are much greater , there sentences extend to imprisonment for three years, and their jurisdiction embraces offences which, both for frequency and importance, are by far the weightiest subjects of the criminal administration of the country The evil which this system produces is twofold it affects the fair distribution of justice and it impairs, at the same time, the efficiency of the police The union of Magistrate with Collector has been stigmatized as incompatible, but the function of thief-catcher with judge is surely more anomalous in theory and more mischievous in practice So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy the danger to justice, under such circumstances, is not in a few cases, nor in any proportion of cases, but in every case In all the Magistrate is constable, prosecutor and judge If the appeal be necessary to secure justice in any case, it must be so in all and if—as will follow—all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time, that which is devoted to matters strictly executive being only the short space daily employed in hearing *thana* reports But the effectual management of even a small police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the police of a large district must necessarily be inefficient which, from press of other duties, is slurred over in two hasty hours of each day I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders should without delay be separated from the judicial function"

4 Mr Halliday's opinions on this subject were substantially approved by two other members of the Committee appointed by the Government of Bengal—Mr W W Bird and Mr J Lowis Mr Bird, who was president of the Committee, stated that he had no objection to the disunion of executive from judicial functions He added that he had invariably advocated the principle alike in the Revenue and the Judicial Departments, but as it was at that time pertinaciously disregarded in one department, it could not very consistently be introduced into the other Mr Lowis characterized Mr Halliday's proposals as "systematic in plan, complete in detail, and sound in principle" With reference to Mr Bird's observation, just cited, Mr Lowis said that it was fallacious "to aver that a departure from right principle in one branch of administration requires, for the sake of consistency, a departure from it in another" It is true that Mr Halliday, eighteen years later, held a different view, and thought that British administration should conform to the Oriental idea of uniting all powers into one centre But his personal change of opinion does not affect the force of his former argument

5 Again, in 1854, in the course of a letter to the Government of India, Mr C Beadon, Secretary to the Government of Bengal, wrote —

> "The only separation of functions which is really desirable is that of the executive and judicial, the one being a check upon the other , and if the office of Magistrate and Collector be reconstituted on its former footing, I think it will have to be considered whether . the Magistrates should not be required to make over the greater portion of their judicial duties to qualified subordinates, devoting their own attention chiefly to police matters and the general executive management of their districts"

In November of the same year, as a member of the Council of the Governor-General, the Hon'ble (afterwards Sir) J P Grant recorded a Minute in which he said that the combination

of the duty of the Superintendent of Police and Public Prosecutor with the functions of a Criminal Judge was objectionable in principle, and the practical objections to it had been greatly aggravated by the course of legislation which had raised the judicial powers of a Magistrate six times higher than they were in the days of Lord Cornwallis "It ought," Mr Grant continued, "to be the fixed intention of the Government to dissever as soon as possible the functions of Criminal Judge from those of thief-catcher and public prosecutor, now combined in the office of Magistrate That seems to me to be indispensable as a step towards any great improvement in our criminal jurisprudence

6 Two years later—in September 1856—a Despatch of the Court of Directors of the East India Company (No 41, Judicial Department) on the re-organization of the Police in India pointed out that "to remedy the evils of the existing system, the first step to be taken is, wherever the union at present exists, to separate the police from the administration of the land revenue In the second place the management of the police of each district should be taken out of the hands of the Magistrate"

7 In February 1857, a further Minute was recorded by the Hon'ble J P Grant, Member of the Council of the Governor-General, upon the "Union of the functions of Superintendent of Police with those of a Criminal Judge" Mr Grant, in whose opinions Mr (afterwards Sir Barnes) Peacock generally concurred, wrote

> "The one point for decision, as it appears to me, on which alone the whole question turns, is this—in which way is crime more certainly discovered, proved and punished, and innocence more certainly protected—when two men are occupied each as thief-catcher, prosecutor, and judge, or when one of them is occupied as thief-catcher and prosecutor, and the other as judge? I have no doubt that the principle of division of labour has all its general advantages, and an immense preponderance of special and peculiar advantages, when applied to this particular case, and I have no doubt that if there is any real difference between India and Europe in relation to this question, the difference is all in favour of relieving the Judge in India from all connexion with the detective officer and prosecutor The judicial eminine is, in my judgment, out of place in the bye-ways of the detective policeman in any country, and those bye-ways in India are unusually dirty Indeed, so strongly does this feeling operate, perhaps unconsciously, upon the English minds of the honourable body of men from whom our Magistrates are chosen, that in practice the real evil of the combination is, not that a Judge, whose mind has been put out of balance by his antecedents in relation to the prisoner, tries that prisoner, but that the Superintendent of Police, whose nerve and honesty are indispensable to the keeping of the native police officer in order, abandons all real concern with the detection of crime and the prosecution of criminals in the mass of cases, and leaves this important and delicate duty almost wholly, in fact, to the native *darogahs* If the combination theory were acted upon in reality—if an officer, after bribing spies, endeavouring to corrupt accomplices laying himself out to hear what every tell-tale has to say, and putting his wit to the utmost stretch, for weeks perhaps, in order to beat his adversary in the game of detection, were then to sit down gravely as a Judge, and were to profess to try dispassionately upon the evidence given in court the question of whether he or his adversary had won the game, I am well convinced that one or two cases of this sort would excite as much indignation as would save me the necessity of all argument *a priori* against the combination theory"

Unfortunately the theory has been acted upon in reality Actual cases—more than one or two —have excited the vehement indignation against which Mr Grant sought in 1857 to provide Mr Grant added that the objections to separation of judicial and police functions seemed to him, after the best attention he could give them, to be founded on imaginary evils He refused to anticipate "such extreme antagonism between the native public officer and the native Judge as would be materially inconvenient" "Under a moderately sensible European Magistrate, controlled by an intelligent Commissioner, who would not talk or act as if police *peons* and *darogahs* were infallible, and dispassionate Judges were never right, I cannot see why there should be any such consequences"

8 These, and similar, expressions of opinion were not lost upon the Government of India, as the history of the legislation which was undertaken immediately after the suppression of the Mutiny shows. In 1860 a Commission was appointed to enquire into the organization of the Police It consisted of representative officers from the North-West Provinces, Pegu, Bengal, Madras, the Punjab, and Oudh—"all," in the words of Sir Bartle Frere, "men of ripe experience, especially in matters connected with Police" The Instructions issued to the Commission contained the following propositions —

> "The functions of a Police are either protective and repressive or detective, to prevent crime and disorder, or to find out criminals and disturbers of the peace These functions are in no respect judicial This rule requires a complete severance of the police from the judicial authorities, whether those of higher grade or the inferior magistracy in their judicial capacity When, as is often the case in India, various functions are combined in the hands of one Magistrate, it may sometimes be difficult to observe this restriction, but the rule should always be kept in sight that the official who collects and traces out the links in the chain of

evidence in any case of importance should never be the same as the judicial officer, whether of high or inferior grade, who is to sit in judgment on the case

It may sometimes be difficult to insist on this rule, but experience shows it is not nearly so difficult as would be supposed, and the advantages of insisting on it cannot be overstated."

Again —

"The working police having its own officers exclusively engaged on their own duties in preventing or detecting crime, the question is, at what link in the chain of subordination between the highest and lowest officers in the executive administration is the police to be attached, and so made responsible as well as subordinate to all above that link in the chain? The great object being to keep the judicial and police functions quite distinct, the most perfect organization is, no doubt, when the police is subordinate to none but that officer in the Executive Government who is absolved from all judicial duty, or at least from all duty involving original jurisdiction, so that his judicial decisions can never be biassed by his duties as a Superintendent of Police It is difficult to lay down any more definite rule as to the exact point where the subordination should commence than by saying that it should be so arranged that an officer should never be liable to try judicially important cases got up under his own directions as a police officer . This raises the question—Who is to be responsible for the peace of the district? Clearly that officer, whoever he may be, to whom the police are immediately responsible Under him, it is the duty of every police officer and of every magisterial officer of whatever grade, in their several charges, to keep him informed of all matters affecting the public peace and the prevention and detection of crime It is his duty to see that both classes of officers work together for this end, as both are subordinate to him, he ought to be able to ensure their combined action The exact limits of the several duties of the two classes of officers it may be difficult to define in any general rule, but they will not be difficult to fix in practice if the leading principles are authoritatively laid down and, above all, if the golden rule be borne in mind that the judicial and police functions are not to be mixed up or confounded, that the active work of preventing or detecting crime is to rest entirely with the police, and not to be interfered with by those who are to sit in judgment on the criminal"

9 The Police Commission in their Report (dated September, 1860) expressly recognised and accepted this "golden rule" Paragraph 27 of their Report was as follows —

"That as a rule there should be complete severance of executive police from judicial authorities, that the official who collects and traces out the links of evidence—in other words, virtually prosecutes the offender—should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case even with a view to committal for trial before a higher tribunal As the detection and prosecution of criminals properly devolve on the police, no police officer should be permitted to have any judicial function"

But although the Commission adopted without question the general principle that judicial and police functions ought not to be confounded, they proposed, as a matter of practical and temporary convenience, in view of "the constitution of the official agency" then existing in India, that an exception should be made in the case of the District Officer The Commission did not maintain that the principle did not, in strictness, apply to him On the contrary, they appear to have stated expressly that it did But they recommended that in his case true principle should, for the time being, be sacrificed to expediency They reported.—

"That the same true principle, that the judge and detective officer should not be one and the same applies to officials having by law judicial functions, and should, as far as possible, be carefully observed in practice But, with the constitution of the official agency now existing in India, an exception must be made in favour of the District Officer The Magistrates have long been, in the eye of the law, executive officers, having a general supervising authority in matters of police, originally without extensive judicial powers In some parts of India this original function of the Magistrates has not been widely departed from, in other parts extensive judicial powers have been superadded to their original and proper function This circumstance has imported difficulties in regard to maintaining the leading principle enunciated above, for it is impracticable to relieve the Magistrates of their judicial duties, and, on the other hand, it is at present inexpedient to deprive the police and public of the valuable aid and vision of the District Officer in the general management of police matters"

The Commission recognized that this combination of judicial with police functions was open to objection, but looked forward to a time when improvements in organization would, in actual practice, bring it to an end —

"That this departure from principle will be less objectionable in practice when the executive police, though bound to obey the Magistrate's orders *quoad* the criminal administration, is kept departmentally distinct and subordinate to its own officers,

and constitutes a special agency having no judicial function As the organization becomes perfected and the force effective for the performance of its detective duties, any necessity for the Magistrate to take personal action in any case judicially before him ought to cease"

10 The recommendations of the Police Commission were adopted by the Government of India, and in accordance with them, Sir Bartle Frere introduced in the Legislative Council on September 29, 1860, a Bill for the Better Regulation of Police The debate on the second reading of this measure, which afterwards became Act V of 1861, and is still in force, is important as showing that the Government of India regarded the exceptional union of judicial with police functions in the District Officer as a temporary compromise Sir Barnes Peacock, the Vice-President of the Council, stated that he "had always been of opinion that a full and complete separation ought to be made between the two functions," while in reply to Mr A Sconce, who had argued that some passages in the Report of the Police Commission were at variance with the principle of separation, Sir Bartle Frere said —

"It was one thing to lay down a principle and another to act on it at once and entirely when it was opposed to the existing system, to all existing forms of procedure, and to prejudices of long standing Under such circumstances, it was often necessary to come to a compromise He hoped that at no distant period the principle would be acted upon throughout India as completely as his honourable friend could desire The honourable member had called the Bill a 'half-and-half' measure He could assure the honourable gentleman that nobody was more inclined that it should be made a whole measure than he was, and he should be very glad if his honourable friend would only induce the Executive Governments to give it their support so as to effect a still more complete severance of the police and judicial functions than the Bill contemplated"

The hope expressed by Sir Bartle Frere in 1860 has yet to be fulfilled It might have been realized in 1872, when the second Code of Criminal Procedure was passed But the Government and the Legislature of the day were still under the dominion of the fallacy that all power must be centred in the District Magistrate, and the opportunity of applying the sound principle for which Sir Bartle Frere had contended was unfortunately rejected In 1882 the Code of Criminal Procedure was further revised and the Select Committee, in their report on the Criminal Procedure Bill, said —

"At the suggestion of the Government of Bengal, we have omitted section 38, conferring police powers on Magistrates We consider that it is inexpedient to invest Magistrates with such powers, or to make their connexion with the police more close than it is at present"

(*b*)—The Existing Grievance, and the Remedy

11 The request which we have now the honour of urging is, therefore, that—in the words used by Sir J P Grant in 1854—the functions of criminal judge should be dissevered from those of thief-catcher and public prosecutor, or—in the words used by Sir Barnes Peacock in 1860—that a full and complete separation should be made between judicial and executive functions At present these functions are to a great extent combined in India, especially in the case of the officers who in the districts of Regulation Provinces are known as Collector-Magistrates, and in the non-Regulation Provinces are known as Deputy Commissioners The duties of these officers are thus described by Sir W W Hunter* —

"As the name of Collector-Magistrate implies, his main functions are twofold He is a fiscal officer charged with the collection of the revenue from the land and other sources, he also is a revenue and criminal judge, both of first instance and in appeal But his title by no means exhausts his multifarious duties He does in his smaller local sphere all that the Home Secretary superintends in England, and a great deal more, for he is the representative of a paternal and not a constitutional Government Police, jails, education, municipalities, roads, sanitation, dispensaries, the local taxation, and the Imperial revenues of his district, are to him matters of daily concern" It is submitted that just as Lord Cornwallis's Government held a century ago that the proprietors of land could never consider the privileges which had been conferred upon them as secure while the revenue officers were vested with judicial powers, so also the administration of justice is brought into suspicion while judicial powers remain in the hands of the detective and public prosecutor

12 The grounds upon which the request for full separation is made are sufficiently obvious They have been anticipated in the official opinions already cited It may, however, be convenient to summarize the arguments which have been advanced of late years by independent public opinion in India These are to the effect (i) that the combination of judicial with executive duties in the same officer violates the first principles of equity, (ii) that while a judicial officer ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his district, (iii) that executive officers in India, being responsible for a large amount of miscellaneous business, have not time satisfactorily to dispose of judicial work in addition,

* "The Indian Empire," p 513 (3rd edition)

(iv) that, being keenly interested in carrying out particular measures, they are apt to be brought more or less into conflict with individuals, and, therefore, that it is inexpedient that they should also be invested with judicial powers, (v) that under the existing system Collector-Magistrates do, in fact, neglect judicial for executive work, (vi) that appeals from revenue assessments are apt to be futile when they are heard by revenue officers, (vii) that great inconvenience, expense, and suffering are imposed upon suitors required to follow the camp of a judicial officer who, in the discharge of executive duties, is making a tour of his district, and (viii) that the existing system not only involves all whom it concerns in hardship and inconvenience, but also, by associating the judicial tribunal with the work of the police and of detectives and by diminishing the safeguards afforded by the rules of evidence, produces actual miscarriages of justice and creates, although justice be done, opportunities of suspicion, distrust and discontent which are greatly to be deplored There is, too, a further argument for the separation, which arises out of the very nature of the work incidental to the judicial office, and which of itself might well be regarded as conclusive in the matter It is no longer open to us to content ourselves with the pleasant belief that to an Englishman of good sense and education, with his unyielding integrity and quick apprehension of the just and the equitable, nothing is easier than the patriarchal administration of justice among oriental populations The trial in Indian courts of justice of every grade must be carried out in the English method, and the judge or magistrate must proceed to his decision upon the basis of facts to be ascertained only through the examination and cross-examination before him of eye-witnesses testifying each to the relevant facts observed by him, and nothing more It is not necessary for us to dwell on the importance of this procedure, nor is it too much to say that with this system of trial no judicial officer can efficiently perform his work otherwise than by close adherence to the methods and rules which the long experience of English lawyers has dictated, and of which he cannot hope to acquire a practical mastery, unless he makes the study and practice of them his serious business In other words, it is essential to the proper and efficient—and we might add impartial—administration of justice that the judicial officer should be an expert specially educated and trained for the work of the court

13 In Appendix B to this Memorial summaries are given of various cases which, it is thought, illustrate in a striking way some of the dangers that arise from the present system These cases of themselves might well remove—to adopt Sir J P Grant's words—"the necessity of argument *a priori* against the combination theory" But the present system is not merely objectionable on the ground that from time to time it is, and is clearly proved to be, responsible for a particular case of actual injustice It is also objectionable on the ground that, so long as it exists, the general administration of justice is subjected to suspicion, and the strength and authority of the Government are seriously impaired For this reason it is submitted that nothing short of complete separation of judicial from executive functions by legislation will remove the danger Something, perhaps, might be accomplished by purely executive measures Much, no doubt, might be accomplished by granting to accused persons, in important cases, the option of standing their trial before a Sessions Court But these palliatives fall short of the only complete and satisfactory remedy which is, by means of legislation, to make a clear line of division between the judicial and the executive duties now often combined in one and the same officer So long as Collector-Magistrates have the power themselves to try, or to delegate to subordinates within their control, cases as to which they have taken action or received information in executive capacity, the administration of justice in India is not likely to command complete confidence and respect

14 It would be easy to multiply expressions of authoritative opinion in support of the proposed reform But in view of the opinions already cited, it may be enough to add that, in a debate on the subject which took place in the House of Lords on May 8th, 1893, Lord Kimberley, then Secretary of State for India, and his predecessor, Lord Cross, showed their approval of the principle of separation in no ambiguous terms Lord Cross said, on that occasion, that it would be, in his judgment, an "excellent plan" to separate judicial from executive functions, and that it would "result in vast good to the Government of India" It was in the same spirit that Lord Dufferin, as Viceroy of India, referring to the proposal for separation put forward by the Indian National Congress, characterized it as a "counsel of perfection" Appendix A to the present Memorial contains, *inter alia*, the favourable opinions of the Right Honourable Sir Richard Garth, late Chief Justice of Bengal, the Right Honourable Lord Hobhouse, Legal Member of the Viceroy's Council, 1872—77, the Right Honourable Sir Richard Couch, late Chief Justice of Bengal, Sir J B Phear, late Chief Justice of Ceylon, Sir R T Reid, Q C, M P, Attorney-General, 1894-95, Sir William Markby, late Judge of the High Court, Calcutta, and Sir Raymond West, late Judge of the High Court, Bombay These opinions were collected and compiled by the British Committee of the Indian National Congress, and, among other important indications of opinions prevalent in India, we beg to refer you to the series of resolutions adopted by the Indian National Congress—which Lord Lansdowne, as Viceroy, referred to in 1891 as a "perfectly legitimate movement" representing in India "what in Europe would be called the more advanced Liberal party" In 1886 the Congress adopted a resolution recording "an expression of the universal conviction that a complete separation of executive and judicial functions has become an urgent necessity," and urging the Government of India "to effect this separation without further delay" Similar resolutions were carried in 1887 and 1888, and the proposal formed in 1889, 1890 and 1891 the first section of an "omnibus" resolutions affirming the resolutions of previous Congresses In 1892 the Congress again carried a separate resolution on the

question, adding to its original resolution a reference to "the serious mischief arising to the country from the combination of judicial and executive functions" In 1893 the resolution carried by the Congress was as follows —

> "That this Congress, having now for many successive years vainly appealed to the Government of India to remove one of the gravest stigmas on British rule in India, one fraught with incalculable oppression to all classes of the community throughout the country, now hopeless of any other redress, humbly entreats the Secretary of State for India to order the immediate appointment, in each province, of a committee (one-half at least of whose members shall be non-official natives of India, qualified by education and experience in the workings of the various courts to deal with the question) to prepare each a scheme for the complete separation of all judicial and executive functions in their own provinces with as little additional cost to the State as may be practicable, and the submission of such schemes, with the comments of the several Indian Governments thereon, to himself, at some early date which he may be pleased to fix"

A similar resolution was carried in 1894, 1895, and 1896 During recent years, also, practical schemes for separation have been laid before the Congress

(c)—Answers to Possible Objections

15 The objections which, during the course of a century, have been urged against the separation of judicial and executive functions are reducible, on analysis, to three only (i) that the system of combination works well, and is not responsible for miscarriage of justice, (ii) that the system of combination, however indefensible it may seem to Western ideas, is necessary to the position, the authority, and, in a word, to the "prestige" of an Oriental officer, and (iii) that separation of the two functions, though excellent in principle, would involve an additional expenditure which is, in fact, prohibitive in the present condition of the Indian finances.

16 It is obvious that the first objection is incompatible with the other two objections It is one thing to defend the existing system on its merits it is another thing to say that, although it is bad, it would be too dangerous or too costly to reform it The first objection is an allegation of fact The answer—and, it is submitted, the irresistible answer—is to be found in the cases which are set forth in Appendix B to this Memorial These cases are but typical examples taken from a large number It may be added that, among the leading advocates of separation in India, are Indian Barristers of long and varied experience in the Courts who are able to testify, from personal knowledge, to the mischievous results of the present system Their evidence is confirmed, also from personal knowledge, by many Anglo-Indian Judges of long experience

17 The second objection—that the combination of judicial and executive functions is necessary to the "prestige" of an Oriental Officer—is perhaps more difficult to handle For reasons which are easy to understand, it is not often put forward in public and authoritative statements But it is common in the Anglo-Indian Press, it finds its way into magazine articles written by returned officers, and in India it is believed, rightly or wrongly, to lie at the root of all the apologies for the present system It has been said that Oriental ideas require in an officer entrusted with large executive duties the further power of inflicting punishment on individuals If the proposition were true, it would be natural to expect that the existing system would be supported and defended by independent public opinion in India instead of being—as it is—deplored and condemned It is not reasonable to assume that the Indian of to-day demands in the responsible officers of a civilised Government a combination of functions which at an earlier time an arbitrary despot may have enforced The further contention that a District Magistrate ought to have the power of inflicting punishment because he is the local representative of the Sovereign appears to be based upon a fallacy and a misapprehension The power of inflicting punishment is, indeed, part of the attributes of Sovereignty But it is not, on that ground, any more necessary that the power should be exercised by a Collector-Magistrate, who is head of the police and the revenue-system, than that it should be exercised by the Sovereign in person The same reasoning, if it were accepted, would require that the Viceroy should be invested with the powers of a criminal judge But it is not suggested that the Viceroy's "prestige" is lower than the "prestige" of a District Judge because the Judge passes sentences upon guilty persons and the Viceroy does not It is equally a misapprehension to assume that those who urge the separation of judicial from executive duties desire the suppression or extinction of legitimate authority They ask merely for a division of labour The truth seems to be that the somewhat vague considerations which are put forward in defence of the existing system on the ground that it is necessary to the due authority of a District Magistrate had their origin in the prejudices and the customs of earlier times revived, to some extent, in the unsettled period which followed the Indian Mutiny We venture to submit that these considerations are not only groundless and misplaced, but that the authority of Government, far from being weakened by the equitable division of judicial and executive duties, would be incalculably strengthened by the reform of a system which is at present responsible for many judicial scandals

18 The financial objection alone remains and it is upon this objection that responsible authorities appear to rely When Lord Dufferin described the proposal for separation as a "counsel of perfection", he added that the condition of Indian finance prevented it, at that

time, from being adopted Similarly, in the debate in the House of Lords on May 8, 1893, to which reference has already been made, Lord Kimberley, then Secretary of State, said —

> "The difficulty is simply this, that if you were to alter the present system in India you would have to double the staff throughout the country,"

and his predecessor, Lord Cross, said —

> "It (the main principle raised in the discussion) is a matter of the gravest possible importance, but I can only agree with what my noble friend has stated, that in the present state of the finances of India it is absolutely impossible to carry out that plan, which to my mind would be an excellent one, resulting in vast good to the Government of India"

The best answer to this objection is to be found in the scheme for separation drawn up in 1893 by Mr Romesh Chunder Dutt, C I E, late Commissioner of the Orissa Division (at that time District Magistrate of Midnapore) and printed in Appendix A to this Memorial In these circumstances it is not necessary to argue either (i) that any expense which the separation of judicial from executive duties might involve would be borne, and borne cheerfully, by the people of India, or (ii) that it might well be met by economies in certain other directions Mr Dutt shows that the separation might be effected by a simple re-arrangement of the existing staff, without any additional expense whatsoever Mr Dutt's scheme refers specially to Bengal, the Presidency, that is, for which the reform had been described as impracticable on the ground of cost Similar schemes for other Presidencies and Provinces have been framed, but it was understood that the most serious financial difficulty was apprehended in Bengal

19 In view of the foregoing considerations, we earnestly trust that you will direct the Government of India to prepare a scheme for the complete separation of judicial and executive functions, and to report upon this urgently pressing question at an early date

We have the honour to be,

SIR,

Your obedient Servants,

HOBHOUSE,	JOHN BUDD PHEAR,
RICHARD GARTH,	J SCOTT,
RICHARD COUCH,	W WIDDERBURN,
CHARLES SARGENT,	ROLAND K WILSON,
WILLIAM MAPKBY,	HERBERT J REYNOLDS

July 1, 1899.

S G P I Delhi —No 234 H D—2-4-1°—99—N V B

Appendix IV.

No 1821, dated the 28th November 1900

From—The Hon'ble Mr J O Miller, C S I, Chief Secretary to the Government of the North-Western Provinces and Oudh,

To—The Secretary to the Government of India, Home Department

I am directed to acknowledge the receipt of your letter no 524, dated 31st March 1900, asking for the matured opinion of this Government on the questions raised in a memorial forwarded by the Secretary of State, protesting against the union of Judicial and Executive functions in the same person in India

2 The system of administration of justice in India has been developed gradually according as experience indicated the method of organisation which promised to be least objectionable in theory, and best adapted to secure the public convenience in practice There is ample evidence that in the Bengal Presidency the earlier administrators were impressed with the necessity of keeping the administration of justice by their officers free from suspicion of bias, and judicial powers were conferred on executive officers reluctantly and only under pressure of necessity Judges administered both civil and criminal justice, and rent cases were heard by the civil tribunals The administration of justice must, however, be prompt as well as pure, and, as financial considerations then, as now, place a limit on the strength of establishments, the combination of promptness with purity made it necessary gradually to widen the jurisdiction of the Magistrate, until the existing system, with its various local modifications, was arrived at In the more recently annexed Provinces, such as the Punjab and Oudh, the system of concentrating all power, executive and judicial, in all its branches—civil, criminal, and revenue—was introduced, and the success of this system in the early administration of these Provinces has undoubtedly not been without its influence on official opinion as to the advantage of retaining as wide a power as possible in the head of the district elsewhere

3 Before examining the objections of the memorialists in detail, it may be noted that their complaints may have reference to either the civil, or the criminal, or the revenue courts But in the administration of civil justice there is now no combination of functions in these Provinces (except in the hill districts of Kumaun) The lower grades of Judges (known as Munsifs and Subordinate Judges) are confined entirely to civil work, unless in the rare cases when Subordinate Judges are given the powers of Additional Sessions Judge Judges of a higher grade deal as Sessions Courts with criminal cases as well as civil work (usually in an appellate capacity), but neither they nor the Subordinate Judges and Munsifs discharge any executive functions, except such as are connected with their judicial work As Lord Hobhouse, one of the signatories of the memorial, says "In fact, as regards civil suits, the separation is perhaps as fully effected as may be"

In paragraphs 2 and 3 of the memorial the combination of revenue and judicial duties is alluded to, and exception is taken to the union in one person of the functions of revenue collector and of appeal court in revenue cases The phrase "revenue duties" in this connection comprises two classes of functions, between which in reality a well marked line of distinction exists One class consists of litigation regarding rent and cognate questions arising between landlord and tenant to which the Government is not a party The other class consists of fiscal business, to which the Government always is a party

The trial of rent suits in these Provinces appears originally to have been made over to revenue courts because of the difficulty of getting a speedy decision from the civil courts in the petty matters usually involved in such suits The procedure was summary, and it was open to the parties to have recourse to the civil courts if they pleased This double jurisdiction was eventually removed

To the transfer to the civil court of the first class of functions, namely, those connected with litigation under the rent law, the Lieutenant-Governor and Chief Commissioner has no objections, except such as arise from considerations of practical convenience In this connection it can hardly be supposed that there arise any of the evils alleged to attach to the union in the same person of judicial and executive functions, for a Deputy Collector trying a rent suit, or a Collector or Commissioner hearing an appeal from a decree passed in a rent suit, cannot have any executive bias one way or the other The suit is one between private litigants, and is unconnected with the Government interests

In provinces like Bengal, where the land revenue has been permanently settled, the revenue officers of Government have no such familiarity with agrarian matters as revenue officers possess in these Provinces, which are mostly temporarily settled But little advantage therefore could accrue in Bengal from employing revenue officers to try rent suits, and a transfer of such suits from revenue to civil courts was effected there some years ago But in these Provinces revenue officers have, from the nature of the land revenue system, far more acquaintance with agrarian conditions than Deputy Collectors in permanently settled regions, and their ordinary duties should usually make them better Judges in rent suits than Munsifs can be

Of course a transfer of rent litigation from the revenue to the civil courts would necessitate an immediate and very large increase in the number of Civil Judges of all grades The reduction in the number of Deputy Collectors would certainly not be commensurate with the

increase in the staff of Munsifs, Subordinate Judges, and District Judges, and the transfer would therefore entail an increase of expenditure

To the transfer of the second class of cases, that is, fiscal cases, to the Civil court, the Lieutenant-Governor and Chief Commissioner very strongly objects In the first place, revenue officers alone receive a special training fitting them for the consideration and disposal of revenue matters, from simple boundary disputes to the complex questions connected with the assessment of the Government land revenue In the next place the assessment of the land revenue is an executive act, which is, and should remain, excluded from the jurisdiction of the civil courts To allow the civil courts to control the assessment and collection of the land revenue would involve a radical change in the administrative system of British India, and would introduce views totally foreign to the history of the country, to immemorial tradition, and to the ideas of the people As the question is merely alluded to in the memorial and not dealt with at any length, the Lieutenant-Governor does not feel disposed to consider it at any further length, and he submits that a proposal which would certainly, if carried into effect, alter radically the character of British rule, and might touch the solvency of the British Government in India, ought not to have been so lightly raised

4 From the third paragraph onward the memorial is directed against the retention of judicial powers in criminal cases in the hands of executive officers

In criminal work the separation of functions is complete in the case of all the more important trials which go to the Sessions Judge In the great mass of ordinary cases also the Judiciary enjoy a large degree of independence, as all appeals from convictions or sentences lie to the Judge Excluding this very large class of criminal cases, the remaining cases may thus be classed on the basis of the combination of powers involved in their disposal —

(1) Cases which the District Magistrate can try himself and does try occasionally,
(2) The supervision which the District Magistrate exercises over all Courts of 1st, 2nd and 3rd class Magistrates in his district,
(3) Appeals which the District Magistrate hears from the decisions of 2nd and 3rd class Magistrates

It is against these powers of the Magistrate-Collector that the memorial is chiefly directed, and it is to the consideration of the questions raised in connection with these powers that the Lieutenant-Governor will address himself in this letter

5 The Lieutenant-Governor has, before replying, consulted the High Court of the North-Western Provinces and the Judicial Commissioner of Oudh, as well as the principal judicial and executive officers in the Provinces, and the most prominent native landlords and other gentlemen I am to forward a copy of the letter addressed by this Government to the officers consulted (page 1), in order that the Government of India may see that the Lieutenant-Governor and Chief Commissioner approached the consideration of the question without undue bias, and with the resolution to elicit and place in a clear light and without reserve all the facts which might bear on the proper solution of the question His Honour was especially desirous of ascertaining what opinion was entertained of the practicability of the plan of separation proposed by Mr R C Dutt in the papers forwarded by the memorialists, and of eliciting opinions as to the possibility of any other alternative plans for attaining the same end should Mr Dutt's plan be rejected as unsuitable

Having regard to the importance of the subject, the Lieutenant-Governor and Chief Commissioner thinks it well to submit the opinions in full for the consideration of the Government of India, but he desires to call particular attention to the views expressed by the Hon'ble the Chief Justice of the North-Western Provinces (page 191), the Judicial Commissioner (page 93), the Board of Revenue (page 35), the various Commissioners of Divisions, the Judge of Haidoi (page 97), and the Judge of Jhansi (page 216), the last named being in favour of separation Attention is also particularly invited to the views of the following native officers and non-official gentlemen as illustrating how the question is regarded by various classes of native opinion —

	Officials	*Page*
Pandit Jwala Prasad, Magistrate and Collector of Jalaun		51
Pandit Bakht Narayan, Judge of Fyzabad		106
Kunwar Bharat Singh, Judge of Rae Bareli		109
	Non-Officials	
Raja F Shyam Sinha		19
The Hon'ble Rai Sri Ram, Bahadur		74
The Hon'ble Raja Tasadduq Rasul Khan, C S I		90
Raja Rampal Singh		198
The British Indian (Talukdars') Association of Oudh		209

6 In paragraph 4 of your letter under reply it is stated that there are two main questions to be answered —

Firstly—How far the combination of executive and judicial functions in the same hands actually leads to abuse, and

Secondly—Whether there are any considerations which must be set off against such abuses as may have occurred, and which tell in favour of retaining the existing system

On the first point I am, at the outset, to invite the special attention of the Government of India to the following remarks of the Hon'ble Mr Justice Knox, till recently the Acting Chief Justice of the High Court of the North-Western Provinces, which give the opinion of an officer who, after a long judicial career, held till recently the highest judicial post in these Provinces (The Chief Justice, Sir Arthur Strachey, was absent in Europe when opinions were invited on the memorial, but he will be asked for an expression of his views, which when received will be sent to the Government of India) Mr Justice Knox writes as follows —

My answer to the first question is that, so far as these Provinces are concerned, and so far as my experience goes, I cannot give one single instance in which the combination under consideration has actually led to abuse I have had some opportunity of seeing "both sides of the shield," and I had the still further opportunity, as Legal Remembrancer to the Government of these Provinces, of examining and reviewing cases of alleged abuse With all this experience my answer is still in the negative But I go further, I have had what I consider the singular good fortune to be intimately acquainted with the district of Allahabad for over thirty years. I am well known to, and am constantly visited by, men of all classes who live in that and the adjoining districts They talk to me with the utmost freedom upon troubles and difficulties, and I have never heard any person, with one solitary exception, even suggest that any Magistrate had abused the judicial powers with which he was invested in order to further executive ends The solitary exception was a native gentleman, holding a brief for a particular object As Judge of the High Court I have frequently had to consider applications for the transfer of criminal cases from one court to another In the majority of these cases, as I could show, if leisure permitted, the prejudice alleged is not the prejudice arising from the Magistrate having pre-judged the case before it came into his court, but a prejudice formed by him when on the judgment seat and arising from something that then took place in court Out of the minority of cases in which the prejudice was supposed to have had its origin, either in the Magistrate having had the case before him in his executive capacity, or in his being overshadowed by the District Magistrate, I do not remember one case in which the allegation was satisfactorily established

As regards Oudh, the Judicial Commissioner, after examining the records of his Court, states that he has only been able to discover one instance of abuse traceable to the combination of both functions in the same hands, and, as his letter at page 93 of the enclosures shows, that instance was of trivial importance and led to no practical injustice Of those District Judges who were consulted through the High Court, Mr Fox of Jhansi refers to six cases in which, in his opinion, the union of judicial and executive functions in the same person led to abuse, but the effect of Mr. Fox's opinion in regard to these cases is largely discounted by the remarks with which the Officiating Chief Justice forwards that opinion, namely,—

The first case quoted is not one in which any evil resulted, so far as the Judge has shown from his recollections The second case came before me as Judge sitting in revision The Magistrate's action in this case I considered very proper and in no way open to criticism In the award of punishment, I thought it possible that the sentence had erred on the side of severity, and, if there had been an error, corrected that error It was an error into which any judicial officer might have fallen In the third, fourth, and sixth cases the errors were the errors of executive, not of judicial, officers My comment on the fifth is that, if the sample given of the Deputy Magistrate's work in question is a fair sample, the Deputy Magistrate knew neither his duties as a judicial, nor as an executive, officer

A few other instances of irregularities of some kind have been brought to notice in the voluminous correspondence which the discussion has produced, but it may be correctly said that they are very few, and that in no case was there any scandalous abuse, the majority are of trivial importance, and many of the instances quoted are noticeable chiefly as showing the refusal of judicial officers to submit to even the appearance of dictation from the executive authority, though that authority was their official superior Viewing the correspondence generally, it undoubtedly shows that in these Provinces no injurious effects appear to have in actual practice followed from the union of the two classes of powers, and this conclusion is confirmed and explained by the following remarks which have been recorded by the Hon'ble Mr Evans, Senior Member of the Board of Revenue —

I may perhaps be permitted to refer to my experience as a Sessions Judge, which office I held at intervals for some six years The provisions in the Code of Criminal Procedure permitting appeals against, and applications for revision of, the orders of all Magistrates are very wide The people of this country avail themselves of those provisions to an almost an excessive degree, as is manifest from the groundlessness of a large proportion of such appeals and applications The members of the native bar are fully alive to, and quite ready to seize on, any possible plea for invoking the assistance of the Sessions Court or the High Court against the orders passed by the magisterial body If, then, in any case there were even a colourable pretext for asserting that the Magistrate of the district, either in cases tried by him or in cases tried by his subordinates, had made undue use of his authority or influence as the executive head of the district, it is certain that such a plea would have found the first place in the petition of appeal I have no recollection of any instance in which any such plea was taken, and I can assert with confidence that no such plea was ever established, that any instance was ever brought to my knowledge, in which anything remotely approaching a serious abuse of his powers by a District Magistrate, was most certainly not the case

7 It is the opinion of the Lieutenant-Governor and Chief Commissioner that actual experience in these Provinces does not show that there is any practical evil calling for remedy in connection with the part of the administrative system referred to by the memorialists The most that can be said is that in a few cases District Magistrates have injudiciously or improperly attempted to influence, or have conveyed their opinion as to the merits of a case to, the officer engaged in trying it But the resentment felt not only by European, but by native, Magistrates when such influence was brought to bear on or advice tendered to them, is in itself sufficient to show that the cases were of the nature of exceptions to the general rule As a matter of fact, both District Magistrates and their subordinates are sensitively opposed to anything having the appearance of interference with the independence of the Judiciary in cases which actually come before the courts The only really bad case of abuse of judicial powers which has been brought to the Lieutenant-Governor's notice during the last five years is one in which a tahsildar in his judicial capacity misused his powers to conceal the misdoings of his executive subordinates But, even if the proposed separation were carried out to its fullest extent, misconduct of a similar character might be committed by any unjust Judge

8 Apart from conversations with the native gentlemen who support the Indian National Congress, and apart from occasional discussions in some philo-Congress newspapers, in which the separation of judicial from executive functions is supported on theoretical grounds, the Lieutenant-Governor, during five years of office, has seen no reason whatever to think that such separation commends itself to public opinion in these Provinces Although all classes of society have been consulted on the proposals made in the memorial, and it must therefore have become matter of common knowledge that such proposals were under discussion, there has yet been no sign of any attempt in the Native Press or on public platforms in these Provinces to agitate for the reform If abuses were common under the present system, it can hardly be doubted that the opportunity would have been taken by those who are in favour of change to give united expression to their views But the people at large have no conception that any such question could come under discussion As Pandit Jwala Prasad, the Collector of Jalaun, states "The masses, I can safely assert, have no conception even as to what the terms Executive and Judicial mean, and therefore to assert that they are agitating for a reform which they cannot even grasp is absurd" And the further remarks of this officer on the dangers of making our elaborate system of administration still more complex may also be quoted —

> It is an open question whether the introduction of the elaborate and complex system of administering justice which obtains at present is wholly good without an admixture of evil, and I, for one, am inclined to look askance at measures which tend to further elaborate the already too elaborated system

Kunwar Bharat Singh, whose experience has been gained in the judicial line of the service, and who is to some extent and in theory a supporter of separation, is equally emphatic as to the feeling of the masses, and states that, "from the people's point of view, I must admit that I never heard any one wishing for such a separation."

That these quotations accurately describe popular feeling on the subject the Lieutenant-Governor has no doubt His Honour finds that a vast majority of officials, including all the most experienced officers, are opposed to separation, not because they may not think separation good in theory and as a counsel of perfection, but because they find the existing union of functions in the same hands to work well, because the union is desirable on financial grounds, and because the union is in harmony with local opinion This is also practically the opinion of all influential native gentlemen The Taluqdars of Oudh, as a body and individually, are opposed to separation, and the influential landlords of the North-Western Provinces are on the same side The necessity, in the interests of law and order, of a strong Government is recognised by all persons of local influence, and their views are forcibly, but without exaggeration, expressed by Raja F Shyam Sinha of Tajpur, in the Bijnor district, who has lived for several years in England and is a gentleman of integrity and intelligence The Raja says —

> To deprive a Magistrate of the district of his judicial powers in any of the districts in these Provinces will not only lower him in the eyes of the people over whom he rules, but the prestige of Government will also suffer irremediably thereby The people of this country naturally look up to one man for guidance, and they have hitherto looked upon the Magistrate of the district as a centre round which everything else rotates, but, when they come to realize that their central authority has lost ballast, they will soon cease to think much of the District Officer, and the regard and respect they were in the habit of showing towards him will vanish

The supporters of separation are, it may almost be said, gentlemen of the legal profession, or gentlemen who draw their inspiration on this question from English, and not from Indian, sources, and are, in number, altogether insignificant.

9. On the first question, then, referred to in your letter—the existence of abuse under the present system,—to which may be added the question of the apprehension of abuse, the answer from these Provinces appears to be unmistakeably—

(1) that no instance of serious abuse caused by the present system can be indicated,

(2) that the cases quoted in support of some degree of abuse are extremely few, that in many of them no evil really resulted, and that others are of the class of exceptions, and show how even slight abuses of power of executive interference with judicial independence are resented and remedied,

(3) that there is absolutely no general feeling against the present system, and that so far as the North-Western Provinces and Oudh are concerned, the memorialists are altogether mistaken in asserting (paragraph 1 of the memorial) - "The present system * * * is condemned by * * * the general view of public opinion in India";

(4) that, while some persons suggest one change as desirable and some another, there are indications of a very general feeling that what is required is—not a change of judicial system or procedure—but more effective control over the proceedings of the police.

To this should be added, on the part of the native community, a general apprehension of change, and a feeling that it would be a dangerous experiment to weaken the powers of the District Magistrate.

10 In paragraph 5 of your letter the request is made that a definite statement should be furnished of all cases of abuse which have come to the notice of the Local Government in the last five years But the correspondence shows that the cases given as instances of abuse were usually much too trivial to come before Government One case in 1898 and one case in 1899 came under the notice of Government, not because of any abuse resulting from them, but because of the intemperate language used in the judgments One case ended in an acquittal, the other in a conviction, in both cases the judicial officer went against what he believed to be the executive view of the matter, and roundly abused his official superior, the District Magistrate, for supposed dictation The only other case that came before Government was that referred to at the end of paragraph 7 above, in which a tahsildar was eventually reduced

11 Coming now to the second part of the question under consideration, I am to point out that there are powerful reasons of practical expediency for the maintenance of the present system on its broad lines The chief of these reasons is connected with the control of the police It cannot be doubted that the existence in the hands of the District Officer of the chief magisterial power enables him to exercise great control and authority over the police Take away from the District Officer his power of Chief Magistrate, and he practically becomes the head of the police in his district, and will, in popular opinion, be identified with the police Indeed, popular opinion goes further, and considers that, deprived of his position of Chief Magistrate, the District Officer will be overridden by his police

In Sir Antony MacDonnell's opinion there is substantial foundation for this idea Nothing is more manifest from the opinions which landlords and other native gentlemen have given than this, that universal mistrust of the police permeates native society The cry from the native gentlemen consulted is, "Let us have no change of judicial system, but let there be more control over the police" In the necessity for greater control over the police the Lieutenant-Governor entirely concurs, as His Excellency in Council will have seen from this Government's letter No 1086, dated the 15th October, and he has no doubt that nothing would tend to diminish the control which already exists more than the withdrawal from the District Officer of the chief magisterial power in the district The Lieutenant-Governor has not the least doubt that, if the people of these Provinces came to believe that they had no longer in the District Magistrate an impartial authority, powerful enough to protect them from police misconduct, it would become infinitely difficult to carry on the administration It is not a question of *prestige* in the sense of the word as used in disparagement by the advocates of separation, it is a question of the trust and confidence of the people in their rulers Deprive the District Officer of the control and power over the police which his possession of the chief magisterial power now gives him, and the people's confidence in him will certainly be shaken That would be fatal to our administration in present circumstances When education spreads, and the police become better, it may be otherwise

The instances in which District Magistrates themselves try cases are comparatively very few The latest returns to hand show that they tried only 1,166 out of 89,386 disposed of within the year Every District Officer in these Provinces is expected to try at least six cases in the year, choosing important cases from various administrative units of area, so as to inform himself better of the working of the police Some District Magistrates are compelled by circumstances to try more, but many do not much exceed the minimum expected It will thus be seen that in these Provinces at all events, no justification exists for the proposed separation on the ground of the frequent exercise of judicial functions by Magistrates, while having regard to the small tale of judicial work required from Collector-Magistrates, no substantial foundation can possibly exist for the memorialists' assertion that "under the existing system Collector-Magistrates do, in fact, neglect judicial for executive work." It is the possession of the power, the knowledge that it can be instantly exercised to bring an offender to justice, that over-awes the policeman or other powerful offender, and emboldens the people to look on the District Magistrate as, to use their phrase, "the protector of the poor"

12 There is, in addition, in the circumstances of these Provinces another powerful reason for retaining judicial power in the hands of the District Magistrate In the great cities and in many districts the forces of disorder lie very near the surface, large classes are criminal and turbulent, and, moreover, numerous cases occur which raise class or religious animosities and involve persons of influence on either side Intricate cases involving personal rights are instituted It is essential, in present circumstances, for the maintenance of law and order, that the Chief District Officer should retain magisterial jurisdiction to deal with such difficulties by way of prevention, while local public opinion demands that, when the law has been broken, the District Magistrate should either try the case himself from the outset or, if not, have the power of removing the trial to his court if justice in a lower court is not being secured But, having regard to the strength of the European service in these Provinces, no European officer would in many instances be available to try such cases if judicial functions were withdrawn from the District Magistrate The remarks of the Judge of Haidar may be quoted as bringing out the necessity for the retention of judicial powers in the hands of the District Magistrates —

> Turning to the matters specially referred to by the Local Government, it appears to me that there would be serious drawbacks to the entire withdrawal of case work from the District Magistrate The chief one is that there are so few European Magistrates available, except District Magistrates It is not that they are wanted to try Europeans, for the cases in which Europeans are involved are so few in number that they could perhaps be met by temporary transfers, but that there so often are cases in every district in which it is advisable that the officer who tries them should be beyond the possibility of an accusation of partiality

I refer to cases which have stirred up religious animosities between Hindus and Musalmans, and to cases where the issue is between a powerful Taluqdar or other land holder and some utterly uninfluential person or persons The great bulk of the subordinate Magistracy would, no doubt, be quite fair and just in trying such cases, but every native Magistrate would certainly be accused by interested persons, both pending and after a trial, of not being impartial The presence of the District Magistrate, able, if necessary arises, to take up such a case himself, is a great safeguard for the doing of justice, for justice cannot be expected from a court if it is libelled and thrown out of its judicial equilibrium.

13 Assuming, then, that the District Magistrate must retain his judicial functions, the question has been considered whether he should continue to hear appeals from convictions by Magistrates of the 2nd and 3rd classes, and whether his present powers of supervision of the subordinate courts should be maintained The Judge already hears appeals from 1st class Magistrates, and the transfer of appeals from 2nd and 3rd class Magistrates from the District Magistrate to the Judge would be a step in the direction desired by the memorialists Upon this point, therefore, the Lieutenant-Governor has made particular enquiry Though many officers see no objection to the transfer, the consensus of opinion is against it In the first place, Judges have already more work than they can well perform, and any increase in their work would involve an increase in their number At the same time the transfer of those cases from the Magistrate would deprive him of a valuable source of information regarding the character and the abilities of his subordinates Where there is no Judge resident in the district—and 22 out of the 48 districts have no resident Judge,—it would mean that appellants in every petty case must take their cases to another district This would involve the poorer classes in great loss, and would in many instances be tantamount to a denial of justice The majority of the Judges of the High Court are not in favour of any transfer of the subordinate criminal courts to the supervision of the Judges, and the Judicial Commissioner points out that it would be impossible without a large increase in the number of Judges to exercise the close supervision that would be necessary If carried out, the transfer should be confined to the work of headquarters Magistrates, Deputies, or Assistants, for, as the Judicial Commissioner remarks, "no person of ordinary common sense would suggest that tahsildars' courts should be made subordinate to the Judge."

In these Provinces the crying need is for more supervision and control over subordinate judicial courts, and, instead of adding to the work of District and Sessions Judges, the Lieutenant-Governor would prefer to add to their number, and so enable them to control more effectively the courts at present under them This is a matter which has already been brought to the notice of the Government of India by this Government The leaders of native society are seriously apprehensive of the effect of weakening the District Magistrate's control over his subordinate judicial staff Persons with an important stake in the good government of the country apprehend the occurrence of abuses if a close control is not kept over the subordinate Magistracy, and they are convinced that such control cannot be exercised by the present staff of Judges There is therefore a strong consensus of official and native opinion in favour of maintaining the existing control which the District Magistrate exercises over the subordinate magisterial courts.

14 In the correspondence forwarded by the Government of India a scheme for the separation of the executive and judicial services is put forward by Mr R C Dutt, and this has been discussed by many of the officers consulted, with the result that it is generally pronounced impracticable The officer who is most strongly in favour of separation is, perhaps, Mr Fox, Judge of Gorakhpur, and even he recognises that the scheme as put forward is an impracticable one, if only on the ground of the expense of complete separation Mr Dutt's scheme is thus criticised by Mr Cox, the District Magistrate of Hardoi :—

> Mr Dutt's scheme appears to be so designed as to allow every officer an opportunity of qualifying himself alternately as an Executive and Judicial officer, and to transfer from him one branch to another just as he is beginning to be useful The future Civilian will spend the first few years of his service in unimportant Executive work He will then suddenly bring the knowledge thus acquired to bear on the entirely different Judicial work of a Joint Magistrate Having devoted six or seven years to learning Judicial work and forgetting what little Executive knowledge he has acquired, he will become an Executive officer and be set to administer a district He will then become a Judge and after that a Commissioner

Some such system as this was actually in practice in the Lower Provinces of Bengal when Sir Antony MacDonnell first came to India, and under it many good Judges and many excellent District Officers were trained In His Honour's opinion a Judge is the better of having had some executive experience, and a District Officer is the better by having had some judicial experience But, after careful consideration of the results of that system, the Government of India decided that specialization was better, and that transfers from judicial to executive employment and *vice versâ* were not, as a rule, desirable, though in particular cases the requirements of the public service might justify them On the whole, the Lieutenant-Governor is disposed to think that this is the best plan to pursue

The adoption of any such scheme as Mr Dutt's would necessitate a considerable strengthening of the staff At present the whole staff is at the disposal at the District Officer for such work as is required At some seasons criminal work is the heaviest, at others revenue work If the staff were divided, it would be necessary that the Deputy Magistrates under the Judge should be strong enough to dispose of criminal work at the heaviest time of the year; and that the Deputy Collectors under the Magistrate should be able to cope with every rush of revenue work. At present the entire strength of the staff can be employed as Magistrates or as executive or as revenue officers, as the case may demand in cases of emergency Under Mr Dutt's, or any similar, scheme the number of officers available in any one capacity will be reduced, and their functions limited. It might be necessary to post officers at different places

on the occasion of any great Hindu or Muhammadan celebration, or for the management of fairs or for other reasons In 1896 the whole staff was engaged in enquiries into the condition of the country and prospects of the crops where famine was apprehended, and during the famine there was great addition to the work of all executive officers On such occasions as those the staff, after separation either of Deputy Collectors or of Deputy Magistrates required for judicial work solely, would be altogether insufficient for its duties In all cases in which the question has been examined it is found that, if the existing staff were divided, and one part employed solely in judicial, and the other part solely in executive, work, the staff remaining to the Collector, after transfer of officers to the judicial side, would be insufficient for the executive work

This question has been examined in detail by the Commissioners of Agra and Lucknow in their communications, and their conclusion that at least one officer more than at present would be required in each district, seems to the Lieutenant-Governor to under-state the necessity One additional European officer would certainly be wanted, and, having regard to the varied nature of the work which the executive staff has to cope with, His Honour is not certain that the removal of all judicial work would allow of any substantial reduction in the present number of Deputy Collectors retained as executive officers But an increase of even one European officer a district would, with the further expenditure which the separation would entail in establishments, in improving the prosecuting agency and providing new buildings, amount to probably six lakhs of rupees In the Lieutenant-Governor's opinion the real expenditure would reach to near ten lakhs But an expenditure of six lakhs, still less of ten lakhs, the finances of these Provinces are at present totally unable to bear In the present circumstances of these Provinces a fifth of the sum would be far more usefully spent in improving the organization of the police, and securing for that service a better *personnel*

15 A suggestion that occurred to the Lieutenant-Governor for rendering the criminal courts independent of the District Magistrate, should their independence be insisted on, was that magisterial powers should be conferred on Munsifs and Subordinate Judges, and the staff of these officers be increased, and on this point opinions were asked for Of course many years would elapse before the existing Civil Judges would be capable of performing magisterial functions, but even then, in the opinion of experienced officers, the discharge of magisterial duties would be very imperfectly provided for In the opinion of one commissioner, who speaks from experience gained as a Sessions Judge, "no one acquainted with the facts could regard with feelings other than of consternation the proposal to entrust Munsifs and Subordinate Judges with magisterial powers"

The Judicial Commissioner of Oudh considers the suggestion altogether impossible, and even the gentlemen most in favour of separation are opposed to the investiture of Munsifs and Subordinate Judges with magisterial powers

16 In the previous remarks the Lieutenant-Governor has placed before the Government of India the results of this important correspondence On few points has he given expression to his own views, but he thinks he should here make his own opinion clear It is not, he thinks, possible to predicate of any system of administration, executive or judicial, that it is the best of all systems The excellence of any system depends on its suitability for the maintenance of law and order and the upholding of private rights in the particular circumstances of time and place In the North-Western Provinces and Oudh the people are extremely backward, only 6 per cent of them have any education Though docile when properly handled, they are liable to fierce bursts of passion, especially if their traditional habits of life or their religious practices are interfered with Mixed up in the population there are predatory castes who live by crime: and in the great cities there is a strong leaven of great turbulence With such a population as this, that system of judicial administration is the best which conduces most effectively to the maintenance of the law, and to the constant application of those humanizing measures, which are being used for the improvement and enlightenment of the people For the present the success of all these measures, and the very existence of stable government, depend on the maintenance of a strong executive authority, and public opinion, as well as the conditions of things at present, demand that this strong executive authority shall not be divorced from judicial power This authority is required as much for the purpose of correcting the shortcomings of the untrustworthy subordinate agencies we are, through want of better, compelled to employ, as to suppress overt crime The existence of such an authority is essential to the idea of Government at present universally prevalent in these Provinces, and its removal would be misunderstood, and might lead to chaos The Lieutenant-Governor looks, equally with the distinguished gentlemen who have memorialized the Secretary of State, to the time when the judicial may be safely separated from the executive power in India but, in his responsible opinion, that time has not yet come in the North-Western Provinces and Oudh

To sum up, the Lieutenant-Governor's views on the subject are these —

(1) That no abuses of serious importance have come to light in these Provinces from the union of executive and judicial functions in the same hands

(2) That District Magistrates themselves, and the Courts subordinate to them, are averse to anything that looks like undue interference with the independence of the Judiciary in cases actually before them.

(3) That the overwhelming opinion of the officers of Government, the Taluqdárs of Oudh, and the landlords of the North-Western Provinces is strongly opposed to any separation of these functions

(4) That, although Magistrates would themselves be glad to be relieved of their appellate functions, the general opinion is—

(*a*) that these functions could not be properly discharged by District and Sessions Judges without a large increase in their numbers,

(*b*) that the exercise of these functions gives District Magistrates a material insight into the character and capacity of their subordinates

(5) That the withdrawal of magisterial powers from the District Magistrate would greatly weaken the control over the police, and compromise his position in the eyes of the people as an impartial arbiter, to whom they can at present appeal in their dealings with the police It is universal native opinion that it is not a change in judicial system which is wanted, but more control by the Magistrate over the police

(6) That no scheme of separation up to the present suggested to the Government is satisfactory, and that, if separation is to be carried out, there must be a large increase in both the European and Native Judicial staff, which the finances of the Provinces cannot possibly bear

(7) Generally, the native public are satisfied with existing arrangements of the union of judicial and executive functions in the same hands Separation would not meet any practical want, and would not be in accordance with the almost universal public opinion of the Provinces.

S G. P. J. Delhi,—No 278 H D.—10-3 13.—100

APPENDIX V.

No 8659, *Bombay Castle,* $\frac{24th}{28th}$ *December 1900*

From—W T Morison, Esq, Acting Secretary to the Government of Bombay, Judicial Department,

To—The Secretary to the Government of India, Home Department

Sir,

I am directed to reply to your letter no 522 of the 31st March 1900, forwarding, for the consideration of the Government of Bombay, a copy of Judicial Despatch no 47 of the 3rd August 1899, from Her Majesty's Secretary of State for India, giving cover to a memorial protesting against the union of Judicial and executive functions in the same person in India I am also to enclose copies of reports received from the officers noted in the margin who, in accordance with the wishes of the Government of India, have been consulted in the matter These reports constitute a valuable body of opinion, and may be considered to be fairly representative of all views held in the Bombay Presidency on this important question

1 Sir Lawrence H Jenkins, Kt, M A, (Oxon), (Bar-at-Law), Chief Justice of the High Court, Bombay
2 The Honourable Mr Justice E T Candy, Barrister-at-Law, I C S, Judge of the High Court
3 The Honourable Mr Justice M G Ranade, C I E, M A, LL B, (Bom), Judge of the High Court
4 The Honourable Mr Justice Badrudin Tyabji, Barrister at Law, Judge of the High Court
5 The Honourable Mr Justice E M H Fulton, I C S, Judge of the High Court
6 The Honourable Mr Justice L P Russell, Barrister at Law, Judge of the High Court
7 The Honourable Mr Justice W H Crowe, Barrister-at-Law, I C S, Judge of the High Court
8 The Honourable Mr H Batty, M A (Cantab), Barrister at Law, I C S, Remembrancer of Legal Affairs
9 The Honourable Mr H F Aston, Barrister at Law, I C S, District and Sessions Judge, Poona
10 Mr G Jacob, I C S, District and Sessions Judge, Ahmednagar
11 Mr J J Heaton, I C S, District and Sessions Judge, Nasik
12 Mr R S Tipnis, B A, LL B, District and Sessions Judge, Thana
13 Mr H E M James, C S I, I C S, Commissioner in Sind
14 Mr G C Whitworth, I C S, Judicial Commissioner in Sind
15 Mr R Giles, C I E, M A, (Cantab), Collector and District Magistrate of Karachi
16 Mr Dayaram Gidumal, B A, LL B, District and Sessions Judge, Shikarpur
17 The Honourable Sir Andrew Wingate, K C I E, I C S, Secretary to Government, now Commissioner, C D
18 The Honourable Mr F S P Lely, I C S, Commissioner, N D
19 The Honourable Mr A F Woodburn, Barrister at-Law, I C S, Commissioner, S D
20 Mr P C H Snow, C I E, Barrister at Law, I C S, Collector and District Magistrate, Poona
21 Mr J L Jenkins, M A (Oxon), I C S, Collector of Salt Revenue
22 Mr M C Gibb, LL B, (Cantab), I C S, Collector and District Magistrate, Ahmedabad
23 Mr A M T Jackson, M A (Oxon), Barrister-at-Law, I C S, Collector and District Magistrate, Thana
24 Mr C G Dodgson, I C S, Collector and District Magistrate, Satara

2 The names of the gentlemen whose signatures are attached to the memorial do undoubtedly command respectful consideration for their views But it may be observed that, of the ten signatories, two only have had any personal experience of the difficulties and requirements of district administration The experience of six of them has been limited to the High Courts of Calcutta and Bombay and as the cases which are brought most prominently to the notice of High Court Judges, in the exercise of their appellate and revisional jurisdiction, are those in which there has been misuse or abuse of authority there is a natural tendency on their part to regard these cases as samples of the whole, while the thousands of cases in which justice is fairly and impartially administered pass unnoticed The Governor in Council, therefore, while admitting that great respect is due to the opinion of these gentlemen in matters within their own sphere of experience, does not consider that undue weight should be attached to their views on the administrative organisation of Indian Districts

3 It is, perhaps, in consequence of the signatories' want of practical acquaintance with the working of district administration, that the memorial conveys an entirely mistaken impression of the system as it now exists The general demand of the memorial is that the Government of India should be directed "to prepare a scheme for the *complete* separation of judicial and executive functions" The memorialists have refrained from indicating what

they understand by judicial as distinguished from executive functions, and until they do this it is impossible either to appreciate the scope of their demand, or to comply with it But the point which is specially selected for attack is the combination of judicial and police powers in the hands of the District Magistrate The attack is supported by one-sided quotations from the heated controversies of bye-gone times, which are inapplicable to present conditions, and though the memorialists are apparently aware that material changes have been made since the Honourable Mr J P Grant recorded his minute on the subject in 1857, yet the gist of the complaint is the same, and it is repeated in almost the same words The Honourable Mr J P Grant objected to the District Magistrate being occupied as "thief catcher, prosecutor, and judge," and the memorialists complain that "judicial powers remain in the hands of the detective and public prosecutor", while in a statement printed as Appendix A -IX in support of the memorial, one of the signatories, an ex-Chief Justice of Bengal, alleges that "Courts of Criminal Justice are subservient to police authority", that "a judge's promotion is dependent on the favour of the chief police officer", and that "Criminal Courts are virtually under police control" It is difficult to imagine whence this conception of the status and functions of the District Magistrate, for which there is no authority in law or practice, can have been derived. Throughout the greater part of India, the Collectors and District Magistrates or Deputy Commissioners, whom it may be convenient to call "Heads of Districts," have no direct concern in the detection or prosecution of offences Their authority over the police is derived throughout India from the Criminal Procedure Code, and, in the different Provinces, from Local Police Acts—in the Bombay Presidency from Bombay Act IV of 1890 Under Section 13 of this Act, the District Magistrate is invested with "command and control" over the police force of his district, and it is believed that there is a similar provision in the other Local Police Acts This command and control is exercised, as it was intended it should be, for administrative purposes alone It does not imply that the District Magistrate takes any part in the investigation of offences, nor, as a matter of fact, is this the case It seems an abuse of language to term an officer who is entrusted with the general supervision of the police within his charge a "thief catcher," "detective," or "public prosecutor" It may also be noted that the command and control of the police vests solely in the District Magistrate and that the Subordinate Magistrates have no share in it Under the Criminal Procedure Code the District Magistrates, and all Magistrates in a greater or less degree, have powers for the prevention of offences and the preservation of order (Chapters VIII to XII of the Code) which are generally exercised by Magistrates in all countries, and are not usually considered incompatible with the exercise of judicial functions It would tax the ingenuity of the ablest theorist in political science to distribute these powers into two classes, judicial and executive, and neither in the memorial, nor in Mr Dutt's scheme, which is recommended for adoption as a practical system, is any attempt made to discriminate between the two classes It is, however, admitted that the District Magistrate, and the Magistrates subordinate to him, may, in certain cases, exercise powers which should disqualify them from trying such case

4 But the memorial not only misrepresents the character of the District Magistrate, it also omits to notice the safeguards which have been provided to prevent the trial of cases being prejudiced by any action taken by him and other Magistrates in directing investigations, and initiating proceedings Under Section 190 (1) of the Criminal Procedure Code, "any Presidency Magistrate, District Magistrate, or Sub-divisional Magistrate and any other Magistrate specially empowered in this behalf may take cognizance of any offence . (c) upon information received from any other person, other than a Police officer, or upon his own knowledge or suspicion that such an offence has been committed" But under Section 191, "when a Magistrate takes cognizance of an offence under Sub-section (1), Clause (c) of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused, if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate be committed to the Court of Session or transferred to another Magistrate" Further, under Section 487 all Judges and Magistrates, except Judges of the High Courts and the Recorder of Rangoon, are absolutely debarred from trying large classes of offences when such offences are committed before themselves, or in contempt of their authority Finally, Section 556 provides that "no Judge or Magistrate shall, without the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed by himself" This section has been interpreted by the High Courts in the widest possible manner, and it is difficult to conceive how, in the face of these provisions, the memorialists have found it possible to declare that the existing system is one under which the District Magistrate, or any Magistrate, acts at the same time as "detective public prosecutor, and judge" The law may in some cases be misinterpreted or even wilfully disregarded, nor can any system be devised under which the law will not occasionally be misinterpreted or disregarded by those to whom the enforcement of the law is entrusted One of the best tests of good government is whether, when abuses do occur, remedies can be obtained, and it must be admitted that in India the means of redress for abuse of authority

on the part of the magistracy are large, simple and accessible in an extraordinary degree Over and above the jurisdiction of the Lower Appellate Courts, there is the wide jurisdiction, appellate and revisional, of the High Courts, the nature of which has been well described by Sir J E Stephen in the following passage —

"All these High and Chief Courts exercise functions in the administration of both civil and criminal justice to which we have nothing analogous in England Besides the powers of appeal and reference to be described hereafter, which are exercised according to legal rules, add generally, upon the application of the parties interested, they *have a power of general superintendence and inspection over the inferior Courts which is possessed by no authority in England over any Court whatever* Every act of every Court in India is elaborately recorded in writing, and a system is established by which all Judicial officers send up, at fixed periods, returns to their superiors, showing precisely how they have been employed during the period (generally I believe a month), how many cases they have tried and with what results, and a variety of other matters At all the High Courts and Courts discharging the functions of a High Court, are officers whose business it is to examine these returns and to bring to the notice of the Judge who has to discharge the duties of superintendence, anything unusual which seems to require notice The Judge of the High Court or Chief Court thereupon causes a letter to be written to the Judge of the inferior Court calling for explanation" "The check on judicial neglect or misbehavior which is secured in England by the interest taken by the public is supplied in India partly by the power of appeal in the hands of the parties, and partly by the powers of revision vested in the High Courts"

It would appear therefore that the authority of the High Courts over the administration of criminal justice is, within the law, absolute, and that the allegations made in the memorial of the subordination of the judiciary to the executive are devoid of foundation

5 The memorialists are able to claim two Secretaries of State for India as supporters of the principle that there should be complete separation of executive and judicial functions It is, in the opinion of the Governor in Council, unfortunate that a principle which has been discarded by the best authorities on constitutional law and political science, as being neither desirable in theory, nor possible in practice, and for which there is no authority in English law, should, with reference to India, have been so easily accepted All attempts to force administrative systems into the mould of academic theories are dangerous, but it is in the highest degree unreasonable that a doctrine which, with the correlative theory of the separation of legislative and executive functions and other dogmas of the pre-revolution era has been consigned to the limbo of exploded formulæ, should be made the ground for revolutionising the system of district administration in India The natural result of this inherently vicious method of proceeding may be seen in the looseness and indefiniteness of the language employed in dealing with the practical side of the question Among the terms commonly used are "judicial functions," "executive functions," "purely judicial work," "magisterial duties," "police duties," "police work," "executive work" and similar phrases to any one of which no two persons would, probably, attach the same meaning It has been pointed out by more than one of the officers, who have been consulted by the Governor in Council, that this vagueness of expression deprives Mr Dutt's scheme, which has been put forward as a workable measure, of any practical value But the same vice, springing from the same cause, has infected the discussion of this question before and since the time of the Police Commission of 1860 In the report of the Commission, to which the memorialists appeal in support of their case, the following passage occurs —

"As the (police) organization becomes perfected, and the force becomes effective for the performance of its detective duties, any necessity for the Magistrate to take personal action in any case judicially before him ought to cease"

On this passage the Honourable Mr Justice Candy remarks in his minute —

"Did the Commission mean that *any* Magistrate in any case judicially before him is not to take personal action? Is he simply to hear such evidence as the complainant or police may bring before him, and is he to refrain from ordering inquiry by the police regarding any important matter which may have been overlooked by them? Surely, when a case is judicially before a Magistrate, he is personally bound to take all action that may be necessary for the elucidation of the truth, for the conviction of the guilty or for the acquittal of the innocent What sections of the Criminal Procedure Code ought to be amended in the opinion of those who support the proposition of the Police Commission? The proposition is so vague that it is impossible to grapple with it No system of Magistracy or of criminal administration in the civilised world debars a Magistrate or Sessions Judge from personally directing enquiry in a case judicially before him Only the other day we had a complaint from the Sessions Judge of one important district in this Presidency that cases were imperfectly committed to his Court, thus entailing on him the necessity of personally taking action in the cases, and adjourning for the production of important witnesses The point is so obvious that I cannot help thinking that the Police Commission and the memorialists meant something different from what was said"

It would be easy to give other instances in which the statements made, if taken in their literal sense, would lead to clearly impossible results, while the sense which is to be attached to them has not been indicated In England the popular idea seems to be that even as an Archdeacon is a person who performs archidiaconal functions, so judicial functions are those performed by a person called a Judge, and some justification of the idea may be found in the Settlement of 1689 under which special provision was made to secure the independence of Judges, while the status of Justices of the Peace and minor Judicial officers was left unchanged It is in this sense that the matter is, apparently, taken by Sir Robert Reid when he says "it is most unadvisable for the same person to act as Judge and as an officer of the Executive Government This thing is not allowed in England, and every man who has read history ought to hope that it will disappear in India" High authority might be quoted for the proposition that Judges themselves are officers of one of the departments of the Executive Administration of a country But, apart from this, Sir Robert Reid can scarcely be unaware that in England the first article in a Commission of the Peace to Justices empowers them

singly to conserve the peace in suppressing riots and affrays and in taking securities for the peace, that a Justice of the Peace, who sits as a Judge in Petty and Quarter Sessions, may also be Chairman and member of a Licensing Committee, of a Watch Committee or an Income-Tax Commissioner His statement clearly is not intended to apply to officers of this class, who in a great degree correspond to, and do the work of, District officers in India There is, however, no excuse for vagueness of statement in respect of the powers exercised by officers concerned in the criminal, or indeed in any branch of the administration of this country There is hardly any step which can be taken of any order which can be passed without the authority of law, and it should be possible for those who have objections to urge against the existing system to point out the specific provision of the law to which they object There is no necessity to have recourse to vague generalities Experience has shown that all discussion of administrative systems which originate in abstract principles are either fruitless or harmful, fruitless if no changes are effected, harmful if changes are introduced to satisfy academic theories without regard to practical conditions

6 I am to say, therefore, that the Governor in Council welcomes the decision of the Government of India, that the matter should be examined on the broad ground of general administrative expediency, rather than with regard to abstract principles, and considers that the field of controversy may, with advantage, be limited to the two questions stated in your letter As regards the first of these—how far the combination of executive and judicial functions in the same hands leads to abuse whether there is any practical evil to be remedied—the opinions obtained from the officers consulted afford ample material for forming a definite judgement Of the Judges of the High Court, the Chief Justice, and two Puisne Judges, the Honourable Mr Justice Ranade and the Honourable Mr Justice Badrudin Tyabji, consider that the system does or may give rise to abuses The Chief Justice, however, qualifies his opinion in the following terms —

> "Though on abstract principles I am strongly opposed to the combination of judicial and executive functions yet, I would not at present urge that District Magistrates, at any rate in the Bombay Presidency, should be deprived of their judicial powers The possession of these powers appears to me to be of value and to increase the usefulness of these officers, nor have I known or heard of their abuse at any time in this Presidency"

On the other hand, the remaining four Judges of the High Court declare that such abuses have never come within the range of their experience, and if existent at all can only be of rare occurrence Thus the Honourable Mr Justice Russell says —

> "Speaking from my own experience as a Barrister who practised (with but few exceptions in Mofussil cases) for over twenty years in the City of Bombay, I cannot say that I ever met with a case in which the combination of executive and judicial functions in the same hands|let to abuse No doubt in one or two mofussil cases we may have been surprised, in the interests of one's client, to find the Court acquainted with and inclined to consider documents and facts which were not before me as counsel in any way, but in the interests of ultimate justice, I cannot say that such inclination of the Court was an abuse"

The Honourable Mr Justice Crowe says —

> "Speaking from my own experience, which I may observe is confined to the Bombay Presidency, I cannot call to mind a single instance where in practical hardship or injustice has followed from the present system I have no hesitation in saying that the combination of executive and judicial functions in the same hands practically leads to abuse in very rare occasions only"

The Judicial Commissioner in Sind, Mr G C Whitworth, and the Remembrancer of Legal Affairs, the Honourable Mr Batty, take the same view Of the five District and Sessions Judges who have been consulted, one alone Mr Dayaram Gidumal, is definitely of opinion that abuses exist, and supports his opinion by examples One, Mr R S Tipnis, considers that "the evil does exist, but it exists in a small degree and in a narrow circle" —an opinion which is admittedly founded on theory only, since Mr Tipnis state that he is unable to support his opinion by instances from his own official career wherein executive duties had clashed directly or indirectly with judicial functions One District and Sessions Judge, the Honourable Mr Aston, has not applied himself to the question The remaining two, Messrs Jacob and Heaton, while remarking on certain defects in the system, consider that no abuses have arisen which can fairly be attributed to the union of judicial and executive functions in the same hands Among the administrative officers of Government there is no division of opinion The Commissioner in Sind, the three Divisional Commissioners, the Collector of Salt Revenue and the five Collectors and District Magistrates, who have been consulted, all declare, with one or two reservations which will be noticed presently, that abuses of the nature alleged in the memorial have never, within their experience, existed in this Presidency

7 It is evident that if the reply to the question stated had to be based on opinions alone the answer must be a decided negative But, further, when the opinions of those who hold that abuses do occur, and that there is a practical evil to be remedied, come to be tested by an examination of all the specific cases of abuse which have been brought forward, it will be seen that these opinions have little, if any, foundation in fact

The cases cited are as follows :—

(*a*) One quoted by the Chief Justice as within his personal experience

(*b*) Fourteeen which have come to the notice of the high Court of Bombay, from the year 1895 to 1899

(*c*) Three, to which allusion is made by the Honourable Mr. Justice Tyabji,

(*d*) Three quoted by Mr. Deyaram Gidumal.

8 In the case cited by the Chief Justice, a military officer temporarily deputed on "plague" duty, who in that capacity was invested with certain magisterial powers, gave verbal orders to the people of a plague-stricken village to leave their houses Five days afterwards he found that one man had not complied with the order, and he thereupon convicted him and fined him Rs 40 The formal order directing the evacuation of the village was not published until seven days after the conviction The Magistrate clearly acted illegally in trying the man at all for breach of an order issued by himself, and also in taking action before the formal order required by law had been issued It may be observed, however, that in this case action was taken under the Epidemic Diseases Act, an Act passed to meet a sudden emergency, conferring wide powers, at first often imperfectly understood, on officers who had little experience of magisterial work It cannot fairly be taken as illustrative of the ordinary course of administration

9 The fourteen cases taken from the records of the High Court are briefly noted below —

No 1 —In this case a Magistrate accepted the hearsay evidence of a Police Inspector The improper admission of hearsay evidence is not confined to Magistrates who all perform executive duties, and as a matter of fact the Magistrate in this case was a full-time City Magistrate, doing nothing but magisterial work

No 2 —The accused was convicted of importing *foreign* liquor The High Court found that there was no proof that it was foreign liquor This is merely a case of appreciation of evidence There is not the slightest ground for supposing that the Magistrate was influenced in his decision by wrong motives

No 3 The Magistrate acting under a provision of the law, which enjoins him to set forth in his order the "number, character and class of sureties (if any) required," directed that none of the inhabitants of a certain village should be accepted as security for a person ordered to find security for good behaviour The High Court held the limitation to be illegal

No 4 —This was a plague case to which the general remarks made in the preceding paragraph apply The Magistrate fined a man for not reporting the death of his sister The High Court held that the accused was not one of the persons bound under the plague rules to report

No 5 —A Second Class Magistrate sentenced two persons for theft, the property alleged to have been stolen being the crop of the accused, which was under attachment for land revenue The High Court held that the offence was not theft, but convicted one of the accused of fraudulent removal under Section 424 of the Criminal Procedure Code, and acquitted the other on the ground of want of proof of criminal intention

No 6 —A District Magistrate directed that the case of a Mámlatdár, who had been charged with the misappropriation of Government property, and had been discharged by the Magistrate, should be transferred to another Magistrate The High Court held that the discharge was on the evidence, and as no new evidence had been brought to light, the accused should not be exposed to further prosecution The issue turned on the evidence of intention on the part of the accused

No 7 —A Second Class Magistrate convicted a person of breach of a toddy license The High Court held that the acts complained of were not breaches of the contract This was a question of the interpretation of the terms of a contract and there is nothing to show that the Magistrate did not interpret them honestly to the best of his ability— at any rate the District Magistrate and Sessions Judge agreed with him

No 8—A District Magistrate dismissed a complaint of defamation and abuse brought by a pleader against an European Subordinate Magistrate without examining the complainant on oath, as he should have done This is a common form of irregularity in dealing with complaints and does not show any bias on the part of the Magistrate

No 9 —This is another plague case A Magistrate convicted a man for not giving notice that he himself was suffering from plague The High Court held that under the rules the person attacked is not bound to give notice No previous ruling existed on this point

No 10 —An Assistant Collector and Magistrate called upon an accused to furnish security under Sections 109 and 116 of the Criminal Procedure Code The High Court held that it was illegal to demand security under both sections This is a matter of interpretation of the law and it does not appear that the Assistant Collector's view of the law was in any way affected by his position

No 11 —An European Magistrate and Assistant Collector directed a person to execute a bond to keep the peace and declared another person to be in possession of certain land The High Court held that the order to keep the peace was illegal, because there was no evidence that a breach of the peace was contemplated, and set aside the order as to possession because the Magistrate had refused to take the evidence of one of the parties This was a case of appreciation of evidence and error in procedure

No 12 —A Native Second Class Magistrate sentenced a man to pay a petty fine for disobedience of an order promulgated by himself His action was clearly illegal and the case was brought to the notice of the High Court by the District Magistrate

No 13 —This was a plague case in which a First Class Native Magistrate and Huzur Deputy Collector fined a man for disobeying a plague rule The High Court reversed the conviction on the ground that the rule had not been brought to the accused's notice

No 14 —A Eurasian Magistrate in Poona ordered an accused who resided beyond his jurisdiction to find security for keeping the peace The High Court held that he had no authority to demand security from a person residing beyond his jurisdiction who only came to Poona for one day In this case it may be noted that the Magistrate, though nominally graded as a Deputy Collector, was in fact a full time City Magistrate, and that the law, as expounded by the High Court, was felt to be so unreasonable that it was immediately amended

It is difficult to conceive on what principle these cases can have been cited as instances of the abuses caused by the union of judicial and executive functions unless indeed every failure to properly appreciate evidence, or interpret the law correctly on the part of Magistrates who perform other duties in addition to their magisterial work, is to be ascribed to this cause In case No 7 for instance a Second Class Magistrate took a certain view of the provisions of a toddy license, and the District Magistrate confirmed his decision on appeal The Sessions Judge took the same view and refused to interfere The action of the Magistrates is to be attributed to bias arising out of the combination of functions To what, then, is the action of the Sessions Judge to be ascribed? The Honourable Mr Justice Ranade in his minute remarks —

"If proper inquiry is made in the record by this office on the Appellate Side of criminal jurisdiction of the Court a large number of complaints of the abuse of power will be found to have been brought to notice of this Court and in many cases proved not to be without foundation As observed by the Government of India I hope the Registrar will be directed to prepare such a list when in the ordinary and extraordinary jurisdiction of the Court the decisions of the Subordinate Magistrates have either been set aside as illegal or oppressive, or a fresh inquiry ordered, with a view to correct some irregularities and further the ends of justice"

An analysis of the list, so far from bearing out the anticipations of the Honourable Mr Justice Ranade, shows that in the years 1895 and 1896 not a single instance of so-called "abuse of power" came to the notice of the High Court, and that, of the fourteen cases reported in the three years 1897—99, two were tried by full-time Magistrates, in one the irregularity was brought to notice by the District Magistrate and in one the Sessions Judge agreed with the Magistrate If the remaining ten cases (of which three relate to a recently passed Plague Regulation and three to proceedings for taking security for good behavior) constitute the indictment against the whole Magistracy of the Presidency for a period of five years, then the Governor in Council is of opinion that, instead of supporting the memorial, these records go far to prove that no necessity exists for any change in the administration of justice

10 I am to say, however, that in the opinion of the Governor in Council, although these cases are worthless for the purpose for which they are adduced, yet they are of great value as showing the minute supervision exercised by the High Court over the most trivial proceedings of the Magistrates' Courts Any person feeling himself aggrieved can, by the expenditure of a few annas for stamps and a petition writer, bring his case to the notice of the High Court with the certainty that it will receive due consideration If it were seriously proposed in England that any person in the least degree affected by any order, however trivial, made in any Criminal Court, should be able at the cost of a few pence to move the highest Court in the land to interfere, the proposal would be scouted as ridiculously impracticable Yet that is, in effect, what is done in India It is impossible that, under such a system, if properly administered, abuses should exist on any considerable scale, or should pass unnoticed when they may occur

11 The Honourable Mr Justice Badrudin Tyabji's cases require special attention In his minute on the subject he has made the following statements —

(*a*) "I know of places where a perfect reign of terror has existed in consequence of the combination of these inconsistent duties in the same officer"

(*b*) "I also know of a case where the accused was sought to be convicted and sentenced on no other evidence than a mere note from the Head District Officer"

(*c*) "I am aware of cases where the Subordinate Magistrates have been censured and reprimanded by the Chief District Officer for acquitting prisoners charged with offences by the Police—not because the acquittals were improper, but because they were likely to weaken the hands of the Police"

These allegations appeared to be of so grave a nature, that it was thought desirable to ask the Honourable Mr Justice Badrudin Tyabji to furnish fuller particulars His reply, which will be found among the papers, shows that the statements made in his minute are subject to very considerable qualifications It appears that the first statement, regarding places in which he has known a reign of terror to exist, refers to one place only, Mátherán, a hill station near Bombay, and only to the enforcement of plague regulations at that place, a matter entirely outside the ordinary administration of the country Stringent measures were everywhere taken to prevent the introduction of plague into hill stations, and in the case of Mátherán, special precautions were necessary owing to the proximity of Bombay There was a good deal of grumbling about the restrictions placed on visitors and their servants, but the measures taken were successful, and, if plague had been introduced, there would have been equally loud complaints about the remissness of the authorities The second statement refers to a case in which

the Honourable Mr Justice Badrudin Tyabji was engaged as counsel for the accused at Burhanpur in the Central Provinces As this case occurred outside the Bombay Presidency, it is not necessary for the Governor in Council to discuss it As regards the next statement, the Honourable Mr Badrudin Tyabji says that an Assistant Collector and Magistrate in Sind incurred the displeasure of the Collector and District Magistrate by acquitting prisoners charged before him by the Police, and that, as the result of correspondence into which the Assistant Collector entered under Mr Badrudin's advice, the District Magistrate declared that if prisoners were acquitted and the evidence got up by the Police was judicially declared to be false or fabricated, the hands of the Police would be weakened, and the security of the district would be affected It is quite possible that a District Magistrate may have remonstrated with a young and inexperienced subordinate for making violent and ill-founded attacks upon the Police, and may have pointed out the bad effect of such a course of proceeding But this is something very different from the charge made in the minute, that the District Magistrate censured his subordinate for acquitting prisoners, not because the acquittals were improper, but because they were likely to weaken the hands of the Police, in other words, for not convicting innocent people at the instance of the Police So grave a charge should not have been made without ample evidence to support it, and the enquiries which the Governor in Council ordered to be instituted with a view of ascertaining whether any such evidence is forthcoming have failed to elicit any justification for the charge, the Honourable Mr Badrudin Tyabji declining to give any names or further details and the Commissioner in Sind reporting that no trace of the correspondence referred to can be found (*vide* Accompaniment, pages 23—27)

12 Of Mr Dayaram Gidumal's three cases two are of old date The first (Reg *v* Dalsukhram) was apparantly an instance of unreasonable use of magisterial powers, such as might and does probably sometimes occur whether the officer's time is, or is not, exclusively devoted to magisterial duties In the second the action of the Magistrates was supported by the Sessions Judge, and the animadversions of the High Court were directed as much against the Sessions Judge as against the Magistrates It can scarcely be maintained that a case in which the misconduct of a Sessions Judge, who is supposed to perform purely judicial duties, is one of the main features, furnishes evidence of the evil of the union of the judicial and executive functions, and of the benefit which will result from their separation The third case is one which came under Mr Dayaram's personal notice A Police Inspector charged a respectable man with stealing wood worth a few rupees from his land, and the accused was convicted by the Sub-Divisional Magistrate On a report made by Mr Dayaram the Sadar, Court ordered further inquiry and finally quashed the conviction, on the ground, principally that the accused was a well-to-do man and would not have run so great a risk for a booty so inconsiderable From these facts Mr Dayaram draws the somewhat remarkable conclusion that "it is not too much to say that if the Magistrate had no official connection with the Police Inspector, an illiterate but masterfulman, the respectable timber merchant, who was clearly the victim of private malice, would not have been sentenced to a month's imprisonment" There is not a particle of evidence to justify this conclusion, which Government observe was not drawn by the Honourable Mr Batty, the Judge of the Sadar Court who tried the appeal, and it is a remarkable thing that a Judge, who considers that it is highly improbable that a well-to-do man should commit a petty theft, should assume, as a matter of course, that an officer in the position of a Sub-Divisional Magistrate would convict an innocent man in order to please a Police Inspector

13 But although the inquiry has proved conclusively that the present system of district administration gives rise to no serious abuses in the Bombay Presidency, it is thought by some that it is attended by certain drawbacks and inconveniences which should be remedied These are briefly—

(1) Want of public confidence in the administration of justice in the Magistrates' Courts

(2) Inefficiency of the Magistrates owing to want of judicial training

(3) Delays in the administration of justice, owing to pressure of other work

(4) The hardship and inconvenience caused to parties and witnesses by attendance at the Courts of Magistrates on tours

The first only of these has any necessary connection with the subject under inquiry The other defects, if they exist, may be cured without having recourse to the separation of judicial and executive functions

14 I am to observe that the Governor in Council does not consider that there is any ground whatever for supposing that the people in the districts have any lack of confidence in the Magistrates' Courts as at present constituted The idea that an officer should not act as Magistrate, because he also has other duties, is limited to a small class, and is entirely foreign to the untutored native mind, and a few days spent in the camp of a District Officer on tour would convince the most sceptical observer that the people, so far from distrusting English officers because they exercise many and diverse functions, are only dissatisfied because they are not omnipotent in all branches of the administration They cannot understand why the *Saheb* should not be able to deal with every complaint and redress every wrong on the spot, and complain most when, as is so often necessary, they are referred to the Civil Courts On this point the Honourable Mr A F Woodburn, Commissioner, Southern Division, says —

"It is not stated whose confidence and respect is meant, but I have no hesitation in asserting that if litigants in criminal cases had their choice, they would, in ninety-nine cases out of a hundred, prefer to be tried by the District Magistrate rather than by any other Magistrate in the district, whether he may or may not have taken action, or received information in his executive capacity I base my opinion on the fact that where I have been a District Magistrate, I have been constantly implored by criminal litigants to take cognisance of their cases and try them myself I think this is good evidence, as far as it goes, of the respect and confidence attached to the Court of the District Magistrate by the people most interested in the quality of the justice to be obtained there"

Mr G Jacob, District and Sessions Judge, remarks —

"The independent public opinion which is said to condemn and deplore the system would probably be largely the opinion of those who have not had fair opportunities for observing the general conduct of the people at large in their relations with Government officials, or, it is to be feared, in no small degree the opinion of those who would wish to undermine the authority and prestige of English officials"

A practical test of the matter may be found in the use made of the provisions of the Criminal Procedure Code which enable accused persons to apply for the transfer of their cases from one Court to another If there were any general distrust in the Court, it might be expected that such applications would be numerous As a matter of fact they are, in proportion to the number of cases dealt with, of the rarest occurrence I am to say, therefore, that the Governor in Council considers that the allegation of want of confidence in the Courts may be dismissed as being contrary to actual experience

15 The argument that Magistrates are less competent to perform their judicial duties satisfactorily because their whole time is not devoted to judicial work has found support in several quarters Thus the Honourable Mr Aston says —

"The Courts of inferior grades become overweighted by a High Court superstructure of a Bench of trained Judges stimulated by a Bar of high legal attainments whose ideals are unattainable as long as the inferior Judges and Magistrates are not also specialists,"

and the Honourable Mr Justice Crowe attributes such evil as exists to "inexperience due to want of judicial training" On the other hand, as the following quotations will show, many officers maintain that the most valuable part of a Magistrate's training is that which brings him into daily contact with the people in all the affairs of life and that a profound knowledge of legal subtleties is of much less importance than a knowledge of the manners, customs and thoughts of the people

"The other consideration which I think, should put a limit on the powers of separation is the necessary requirement of the English portion of the Judicial Department itself In this connection the fact that we are foreigners in India does not seem to me to receive sufficient attention What we have first to look to in a Judge is not knowledge of the law, but knowledge of the people It is, I believe, a peculiarly English habit of mind to regard law as something very technical and apart from ordinary life At any rate, it is evident that law cannot be well administered without a competent knowledge of the people among whom it is to be enforced It is essential, therefore, that English civilians should not be given purely judicial functions till they have acquired considerable experience of the country For their effective training, whether to become Judges or Collector-Magistrates, I would keep judicial and executive functions combined as at present"—*Mr G. C Whitworth, Judicial Commissioner in Sind*

"I would venture to submit that a study of legal subtleties is not necessary for the disposal of ordinary magisterial work It is, I think, much more important that a Magistrate should have some knowledge of, and sympathy with, the people, should be acquainted with the business of their daily life, and their customs, cares and sorrows, than that he should have mastered the technical difficulties which, in exceptional cases, may arise for decision in Appellate Courts"—*The Honourable Mr H Batty, Remembrancer of Legal Affairs*

"I am strongly opposed to any sharply defined line being drawn between the subordinate judiciary and executive officers, so that an officer entrusted solely or mainly with the trial of magisterial cases should always be confined to that work I strongly object to the creation of a permanent class of what may be called 'arm chair' Magistrates, men who simply sit in their Courts for a certain number of hours every day, record whatever evidence may be brought before them, and pass judgments In my humble opinion the best judicial officer in this country is he who has had some opportunities of travelling about and being in real touch with the people"—*The Honourable Mr Justice Candy*

"The memorialists next proceed to lay stress upon the importance of employing experts to administer the law, and draw a purely imaginary picture of the Magistrate who tries his cases by the light of nature We must presume them unaware of the fact that no officer is granted magisterial power until he has passed an examination in law, and that the education of District Magistrates in criminal law is precisely the same as that of District Judges . I venture to say that the average Magistrate's knowledge of criminal law is at least equal to that of the legal practitioners who appear before him, and much better than that of the majority of the unpaid Justices in England"—*Mr. A M T Jackson, Collector and District Magistrate of Thana.*

These remarks apply with full force to English Magistrates, but they are also applicable in great measure to Native Magistrates who frequently are appointed to do duty in parts of the country where the language and the people are strange to them, and even in their own country have as Government officers to deal with people with whom, owing to differences of race, caste and religion, they would not be brought into contact in ordinary life There can be no question that the administration of justice ought to be more efficient in the hands of Magistrates possessing wide general experience, than in the hands of a separate magisterial caste

16 The view that owing to the subordination of judicial to executive work, delays occur in the disposal of cases is supported by the Chief Justice, the Honourable Mr Justice Candy, and the Honourable Mr Justice Fulton, among others I am to observe, however, that there is, except perhaps in the Province of Sind, no real necessity for such delays In the Presidency proper the charges—whether districts, divisions, or talukas—are comparatively small

The division held by the Assistant Collector and Magistrate consists on the average of three talukas, his calendar is not usually heavy, and there is certainly no reason why his revenue work should interfere with the prompt disposal of cases In each taluka there are two Magistrates, a Mamlatdar who is generally a Second Class, but sometimes a First Class Magistrate, and the Mamlatdar's Head Karkun, generally a Third Class, but sometimes a Second Class, Magistrate, both of whom may not be, and never are, absent from head-quarters at the same time In ordinary times the Mamlatdars and head Karkuns are not over-worked and have sufficient time for the performance of all their duties The orders of Government are that the disposal of criminal cases should invariably have priority over other work, and if these orders are observed there should be no delays But complaints are sometimes made that revenue work is neglected for the performance of magisterial work It is probable that the same officers who plead "other work" as an excuse for delay in dealing with criminal cases, also plead criminal work as an excuse for the neglect of their revenue duties, and that such delays as occur are generally due to the indolence of the individual If regard be had to the infinitely greater delays which occur in the Subordinate Civil Courts, it may greatly be doubted whether any improvement would result from the establishment of an entirely separate system of Magistrates' Courts The defect, where it exists, can be cured by the employment of more officers, when required, and by stricter supervision on the part of the superior Courts when the number of officers is already sufficient

17 There is much difference of opinion regarding the amount of inconvenience caused by Magistrates being on tour The Honourable Mr Fulton considers that "the recurrence of the travelling season must necessarily cause no small inconvenience to the parties and witnesses who have to follow Magistrates about This is, I think, a real evil, not only involving hardship, but prejudicial to criminal administration, as supplying another reason for unwillingness of witnesses to come forward," while Mr G C Whitworth speaks of "the amazing amount of trouble and annoyance occasioned to persons bound over to attend a wandering Court, presided over by an officer who may at any moment be called away to attend to other duties" But, if the system sometimes causes inconvenience, it often has the opposite effect In some cases witnesses going to a Magistrate's camp will have a greater distance to go than if they had to attend a fixed Court at the head-quarters of the district or taluka, but in others the Court is brought close to their homes, and a considerate Magistrate, when trying a case in which there are many witnesses, will endeavour to fix his camp so as to suit the convenience of the majority Much less delay and inconvenience are, in fact, caused when a case is taken to a Magistrate who has other work to do, but is bound to give priority to criminal cases, and can take up a case directly it arrives, than when it is taken to a full-time stationary Magistrate who has his hands full of equally emergent work, and can only direct that the case must wait its time It is on this account that, when a case goes to the Sessions Judge, the people connected with it may have to hang about for ten days before it is taken up at all Any change of system which did not involve the entertainment of double the number of officers now employed would certainly, owing to the enlargement of jurisdictional areas, result in greater inconvenience than is experienced at present This view of the question has been well expressed by the Honourable Mr H Batty in the following passage —

"The radical difficulty, it is submitted, arises from the fact that if subordinate executive officers were deprived of their magisterial powers, each taluka which now enjoys two or three Magistrates would have to go shares with one or two other talukas in a single stationary Magistrate, and instead of justice being, as it frequently is, brought home to the doors of suitors by special arrangements of tours, the suitors and their witnesses would, in the majority of cases, have to traverse half the district for each hearing, and perhaps arrive either too late or only in time to find that owing to pressure of work or failure in serving processes, the case had to be adjourned As it is, I think in most cases Magistrates show great consideration, and naturally preferring to be as near to the scene of the crime as possible, arrange for cases to come off at camps in a neighbourhood convenient for all concerned"

I am to say that the Governor in Council does not question the desirability of having stationary Magistrates at the centres of population, and this object is gradually being effected to a greater and greater extent, but for the rural population, the balance of convenience lies on the side of peripatetic Magistrates In Sind, where the districts are of great extent, and the Divisions are larger than most districts in the Presidency Proper, more stationary Magistrates are apparently required, and any proposals which the Commissioner may make for increasing their number will receive careful consideration The proposal, which forms part of so many of the schemes of reform put forward in this Presidency, that the Subordinate Judges in each district should be invested with magisterial powers, is open to serious objection as being detrimental to the administration both of civil and criminal justice During the stress of recent famine operations, the experiment was made of relieving the magistracy in some districts by giving criminal powers to the Subordinate Judges, but it did not prove satisfactory, and not unfrequently evoked a remonstrance from the High Court And two of the Judges of the High Court, the Honourable Mr Justice Candy and the Honourable Mr Justice Fulton, have now recorded in their minutes their disapproval of this arrangement as injurious to the administration of criminal justice, and likely to aggravate the irregularities of procedure which is at present an unsatisfactory feature in the working of the Civil Courts

18 It would appear from the memorial and its appendices that in Bengal objection is principally taken to the union of police powers and magisterial functions in the hands of the District Magistrate In this Presidency, on the other hand, it is almost universally recognised that the maintenance of the District Magistrate in his present position is absolutely

necessary for the peace and security of the district and the proper control of the police Of the officers whose opinions are on record, the Honourable Mr Justice Candy puts forward a scheme under which the title of District Magistrate would be abolished, the Head of the District who would then be termed Collector only, be deprived of power to try cases and hear appeals, but in all other respects would retain his powers under the Criminal Procedure Code and other Acts, the word Collector being substituted for District Magistrate wherever it occurs This scheme, which is avowedly proposed, not as a remedy for an existing evil, but to meet "a demand amongst those classes which can make themselves heard" does not commend itself to the Governor in Council The Honourable Mr Aston proposes a similar plan without the change of names The Honourable Mr Badrudin Tyabji and Mr Dayaram Gidumal content themselves with supporting the general principle of the separation of functions and do not enter into practical details The Honourable Mr Justice Russell, after stating a case in which the balance of advantage clearly lies on the side of the existing system, suggests that Mr Dutt's scheme should be tried as an experiment in Bengal And Mr R S Tipnis recommends that certain classes of cases should be tried by specially appointed Magistrates, independent of the District Magistrate With these exceptions, official opinion in this Presidency is unanimous as to the necessity for maintaining the Head of the District in his present position as Collector and District Magistrate with unimpaired powers There is, however, a scheme, put forward by the Honourable Mr P M Mehta and adopted by the Presidency Association which may be taken to represent the most extreme views held on the subject in this Presidency Under this scheme there would be in each district two officers, a Collector and a District Magistrate, instead of a Collector and District Magistrate It is noteworthy that even under this scheme it is not proposed to tamper with the position of the District Magistrate, or in any way to diminish his authority over the police, while under Mr Dutt's plan there would be no District Magistrate, his judicial functions being taken over by the District Judge, and his authority over the police by the District Officer The objection here is to the union of the powers of District Magistrate and Collector in the same hands, and it is especially urged that officers who as Collectors are responsible for the collection of the revenue, cannot safely be trusted as Magistrates to deal with cases under fiscal acts such as those relating to Salt, Customs, Opium, and Abkari Judged merely by general principles the argument is sound, but it is nevertheless fallacious because it is based on an entirely false conception of the attitude of District officers in this Presidency towards matters connected with the revenue The District officers are, generally, devoted to the interests of the people who are committed to their charge, and their devotion has frequently carried them to extreme lengths in opposing measures which in their opinion press hardly on the people. There have been no more outspoken critics of land revenue settlements and forest settlements, and their voice has generally been raised in favour of moderate assessments and extended privileges It is not to be believed that officers who show this spirit in revenue matters with which they are closely concerned would show partiality as Magistrates in dealing with cases relating to the Customs and Salt Revenue with which they have nothing to do, or the Opium and Abkari Revenue, for which a separate Department is directly responsible

Cases have been brought to the notice of the Government of India and this Government in which wholly inadequate sentences have been passed on opium smugglers, and cases constantly occur in which professional salt smugglers are punished by fines amounting to a fractional part of the value of the salt attempted to be smuggled It would on the other hand require careful search to discover any cases in which the convictions have been unjust or the sentences unduly severe The whole tendency of the Subordinate Magistrates in dealing with cases of this kind is, in fact, towards undue leniency rather than undue severity, and this tendency is due to the attitude of the District officers whose views are faithfully reflected by their subordinates One of the greatest advantages of the present system of district administration is that the Head of the district, while exercising general supervision over all branches of the admistration, is not exclusively devoted to any one of them, and, being impartial, is able to exercise a salutary check upon the zeal of departmental officers Any changes which would result in breaking up the administration of the district into a number of independent departments, each eager to secure its own ends, and with no common superior below Government to bring them into co-ordination, would certainly result in confusion, in the oppression of the people by over-zealous or corrupt departmental subordinates, and in widespread discontent

19 As it is held that, in this Presidency, the existing system does not lead to abuse and that there is no practical evil resulting from the system, which requires to be remedied, it is unnecessary to consider, at any length, the advantages which might be claimed as a set-off against any abuses proved to exist That there are advantages is admitted by many of those who advocate changes in the present system They may be briefly indicated as consisting (1) in strengthening British rule in India; (2) in securing the people against oppression on the part of subordinate officials; and (3) in conducing to the harmonious working of all branches of the administration The first of these advantages has been fully set forth in a minute by Sir Fitz James Stephen printed as No XXXI of the selections from the Records of the Government of India, Home Department, and it is impossible to add, either in force and clearness of expression, or weight of authority, to his statement of the case, which is summed up in the following words

"It seems to me that the first principle which must be borne in mind is that the maintenance of the position of the District officers is absolutely necessary to the maintenance of British rule in India, and that

any diminution in their authority over the natives would be dearly purchased even by an improvement in the administration of justice within their own limits, and as regards the population of their own district, the District officers are the Government and they ought, I think, to continue so"

The second advantage is more generally overlooked, but it is nevertheless of the greatest importance The swarms of subordinate officials in this country may easily become a curse to the people This is fully recognized in the case of the police, and for that reason it is generally admitted, in this Presidency, that the authority of the District Magistrate over the police should on no account be diminished But it is equally true, though in a less degree in the case of the subordinate officials of these departments, and one of the greatest benefits of the present system is that it provides in the Head of the District and his assistants a body of impartial officers, who have the power to interpose promptly and effectually for the prosecution of wrong doing and oppression In this connection I am to invite attention to paragraphs 6—8 of Mr Jenkins' note on the subject and to the instances given in paragraph 9 of the Honourable Mr H Batty's letter As regards the third point, it is certain that the distribution of the powers of the Head of the District among several officers would lead to a constant clashing of authorities which would go far to make good administration impossible The experiment of separating magisterial from executive functions was early tried in this Presidency and proved a failure, and the preamble of Regulation III of 1818, under which the office of Magistrate was joined with that of Collector, states that the reason for the change was "to prevent the collision of authorities and to facilitate the administration of criminal and civil justice" Furthermore the memorialists do not appear to have given due consideration to the inevitable results of a change of system Do they seriously contend that to achieve the separation of functions which, according to Mr Justice Badrudin Tyabji, the mofussil agriculturist is yearning for, the rural tax-payer will cheerfully assent to such enhancement of his liabilities as will suffice for doubling the number of English civilians at present required annually to maintain our rule and methods of administration in the country? Or do they assume (an impossible assumption on the face of it) that each District officer when relieved either of his magisterial or revenue and miscellaneous duties, as the case may be, can deal satisfactorily with an area double in extent his present charge? Or, finally, is it their wish that one or other branch of the administration should be bereft of half its present European supervision, be it the courts of justice or the police or those who are responsible for the recovery of land revenue in bad seasons, or the subordinate officers of excise or those who have to cope in time of emergency with riot, plague or famine? Any one of these alternatives seems to the Governor in Council equally visionary and impracticable

20 I am, finally, to state the conclusions at which the Governor in Council has arrived on a careful consideration of the question They are as follows —

(1) that, in the Bombay Presidency, no abuses have resulted from the present system, and there is no practical evil to be remedied,

(2) that, if in other parts of India, where a similar system obtains, abuses have occurred experience in the Bombay Presidency proves that such abuses are not the necessary result of the system, but are due to faulty administration, and

(3) that the present system possesses great advantages, some or all of which would be lost under any other system which could be adopted, and no change is necessary or desirable

I have the honour to be,
Sir,
Your most obedient Servant,
(Signed) W T MORISON,
Acting Secretary to Government

P S—It was observed, after the whole question had been fully considered by the Governor in Council, that no statement of cases similar to that prepared by the Bombay High Court had been forwarded by the Judge of the Sadar Court in Sind when submitting his opinion A statement has now been furnished by the Acting Judge, and I am to forward it herewith, with the remarks of the Commissioner in Sind thereon and to say that the errors noticed do not seem in any way attributable to the present system or such as should lead the Governor in Council to modify the conclusions expressed above

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S G P I, Delhi—No. 258 H D—13-3-13—100—P A. B.

Appendix VI.

No 2912, dated the 13th June 1900

From—J L Jenkins, Esq, M A (Oxon), I C S, Collector of Salt Revenue, Bombay,

To—The Secretary to the Government of Bombay, Judicial Department

With reference to Mr Under Secretary Loid's letter no 3413 of the 15th ultimo, I have the honour to submit a note on the question of the union of judicial and executive functions in the same person in India

Note on the Question of the Union of Judicial and Executive Functions in the same person in India

It must be admitted that the advocates of change in the system of administration in India have at least a good cry, and the value of a good cry is well known to politicians Most English people assent, as a matter of course, to the maxim that judicial and executive functions ought to be separated, just as they will also assert that executive and legislative powers should be kept distinct It could easily be shown that the English system departs very widely from these principles, which in effect mean something very different from what the words actually express What the separation of executive and judicial functions really means, to an Englishman, is that there should be no outside interference with Civil and Criminal Courts in the trial of cases It is in this sense that it is understood by the Right Honourable Sir R Couch when he says that "every practicable effort to preserve the independence of judicial tribunals in India should be made" When, therefore, people are told that executive and judicial functions are combined in the same person in India, they understand that the Courts in the trial of cases are not independent and are perverted to do injustice The cause is, to all appearance, won by the cry alone Statesmen admit the existence of the evil and deplore it, but urge financial considerations as an excuse for doing nothing This method of dealing with questions which it is inconvenient or troublesome to decide, at the moment, is no new thing. Eminent English statesmen assented to the principles enunciated by the anti-opiumists, and the House of Commons passed a Resolution condemning the connection of the Government of India with the iniquitous traffic Yet when inquiry was made, and the practical issues were once fairly stated, it was soon found that the accepted principles could not be made to square with the ascertained facts In English politics, as in English life generally, the acceptance of a formula goes for nothing, and is not held to imply any necessity for action

2 It seems to me that the most striking thing in the whole of the papers is the manner in which it is sought to decide practical issues by loose and general statements No attempt is made to define what is meant by judicial and executive functions, though the union of these is made the ground-work of the charge against the present system It is clear that the words are not intended to be used in their strict sense Judicial functions are in strictness limited to (1) the receiving of evidence and the forming of an opinion thereon, and (2) the interpretation of the law When a Judge, having come to a decision, proceeds to pass an order he does an executive act, and this is so fully understood, that, in most countries, his discretion is very strictly limited by law on the express ground that the discretion of Executive Officers should be so limited A Juryman or Assessor is the only example of a purely Judicial Officer which occurs to me Judges are, in fact, as they have been described by a great writer on jurisprudence, "the Executive Officers of the law" They only differ from other Executive Officers of the State in being required, before they act, to ascertain the grounds for their action by a more formal course of procedure than is prescribed in the case of other Executive Officers The separation of executive and judicial functions is, therefore, an impossible theory, and the sooner such unmeaning jargon is discarded the better Let it be considered whether there is in the present system anything which prevents or tends to prevent the fair and impartial administration of justice

3 The head of an Indian District appears in three principal characters, as Collector, as Magistrate, and as Head of the Police In all these capacities his powers are strictly defined and limited by law There is in fact hardly any step he can take, hardly any order affecting private individuals which he can pass, without legal authority In almost all cases persons aggrieved by his action may either seek redress in the Civil Courts, or may appeal to higher Criminal Courts, or to Government It is clear that we have here something very different from the exercise of arbitrary power, dependent only on the will of the individual exercising it, which, rather than the concentration of all power in the hands of a single official, is the key-note of Oriental Government The position has in fact very closely approached

that which Lord Hobhouse describes as "the substitution of a fixed impersonal law for the personal views of the rulers for the time being," and as most cases can, in one way and another, be brought within the purview of the District Courts and the High Courts, the law is in effect "declared by a separate staff of functionaries" But, altogether outside the legal authority yielded by the Head of the District, there is the extra legal influence which he may exercise upon or through his subordinates, which is of too vague and general a character to be capable of definition, and may like any other influence be exercised for good or evil As long as Government exists there must be superiors and subordinates, and the prospects of the subordinates must, to a considerable extent, depend on the good will of the superiors This influence pervades the whole of the administration, and even Judges of the High Courts are not exempt from it, so long as they are eligible for appointment to Memberships of Council, and may be the recipients of titles and decorations If it is used improperly, that is the result of the character of the men, not of the nature of the work they are appointed to do A foolish or unscrupulous District Magistrate may interfere improperly with the discretion of a Subordinate Magistrate in the disposal of criminal cases, and, if the Subordinate Magistrate has little independence of character, the interference may be successful If the Magistrate were subordinate to a District and Sessions Judge of the same character, the result would be the same A redistribution of work among different officers will not eliminate the infirmities of human nature

4 The work of the Head of a District as Collector seldom touches upon his work as Magistrate He may, however, have to deal with cases under Special Acts relating to Salt, Opium, and Abkari, which affect the revenue The connection between his duties as Magistrate and as Head of the Police is much closer, and they are so closely interwoven that it will require extensive alterations in the law to separate them It is true that in the Bombay Presidency, under the District Police Act, the District Magistrate has only been vested in a general way with the command and control of the Police in his district, with certain limited powers of supervision All definite power under that Act is vested in the Inspector-General of Police and the District Superintendent Nevertheless the Head of the District has great and, in times of emergency, supreme authority over the Police, and this authority springs from the powers which he has as District Magistrate under the Criminal Procedure Code It is through the reports or cases which come to him, or which he may call for under that Code that he learns how the Police are doing their work, and with that knowledge is able to take measures to maintain the efficiency of the Police, and prevent the oppression of the people If the Head of the District ceased to be District Magistrate under the Criminal Procedure Code, he would, in the absence of further legislation, be reduced to a mere figure head as regards the Police

5 It is alleged that this system leads to injustice and oppression, and the allegation is supported, firstly, by *a priori* arguments of what ought to happen under such a system, and secondly by a certain number of specific instances Now a system cannot be judged by theoretical principles, apart from the surrounding conditions, and the character of the men who work it The theoretically most perfect systems have generally failed in practice as constitution mongers have found to their cost, while those which have grown up gradually, and have been insensibly adapted to the conditions of the country in which they are found, have worked well, though outside critics would pronounce them unworkable The world can show few things worse, in theory, than the judicial system in England, where the Lord Chancellor, the Head of the Judiciary and the dispenser of judicial patronage, comes into office with his party, and leaves it with his party and where almost all judicial officers Judges, County Court Judges, Stipendiary Magistrates and Justices of the Peace generally receive their appointments as rewards for party services It might reasonably be predicted of such a system that it must necessarily lead to intolerable abuses, and it is quite possible that an earnest seeker for what he wanted to find might unearth examples of such abuses But every one will admit that, in its general results, the English system is one of the best, not one of the worst, in the world, and as far as I remember there has been no case, since the vindictive sentence passed on Lord Cochrane in 1814, in which an English Judge has lain under suspicion of partisanship, though strange stories are sometimes told of proceedings in Magistrates' Courts The system has been redeemed by the independence and fine sense of honour of a great profession, and the sentiment of fair play which is characteristic of the people

6 Now we have in India a small body of English officers specially selected and trained who from their very position are more impartial and independent than any officers serving in their own country can be They have no private interests to serve, and the gulf which separates them from the people of the country has at least the advantage of preserving them from influences to which officers serving in their own country are exposed On the other hand, we have a people accustomed for centuries to oppression on the part of Government officials, and enduring it without complaint unless it passes all bounds Set above the people is a host of native officials, drawn for the most part from families accustomed for generations to regard the proceeds of extortion and corruption as the legitimate rewards of Government service, among whom detection and punishment are regarded as unfortunate, but not disgraceful Now, as in the time of Sir John Malcolm, the people of India are divided into two great classes, the "Zálims" and the "Mazlums"— the oppressors and the oppressed Now, as then, it is the beneficent duty of the Head of the District and his Assistants to stand between the oppressors and the oppressed This is the true justification of the combination of

powers in the hands of the Head of the District—not the strengthening of Government, but the protection of the people, and I believe the powers are loyally and faithfully exercised to that end Holding this view of the character and position of the Head of the District, I can only gaze with astonishment on the wholly unfamiliar portrait presented in these papers He is here depicted as using his authority to favour the interests of Government in fiscal matters I have always found him inclined to favour the people at the expense of Government As all the Salt cases, most of the Opium cases, and many of the Abkari cases in this Presidency have, for some years, passed through my hands, I think I may speak with authority on this point, and I do not think Forest Officers in this Presidency would admit that District Magistrates favour their Department unduly The Settlement Reports of this Presidency will prove conclusively, if proof is needed, what the attitude of the Heads of Districts in fiscal matters has been Their influence has almost invariably been exerted in favour of the payers of revenue, and, not infrequently, their opposition to what they consider unfairness in assessments has been carried almost beyond legitimate bounds Yet there has never been a case in which an officer has incurred the displeasure of Government on that account Again, it is maintained that the District Magistrate is so closely identified with the Police that he cannot be trusted to deal fairly with cases sent up for trial by the Police He is dignified with the name of "thief catcher" and "public prosecutor" It is said that it is his duty to initiate criminal proceedings, that he is virtually a Police officer, and exercises the functions of Policeman and Judge, and, one eminent authority, the tone of whose remarks does not show the judicial fairness and moderation which might be expected, goes so far as to imply that the Courts of Criminal Justice are subservient to Police authority, that a Judge's promotion is dependent on the favour of the Chief Police officer, and that Criminal Courts are virtually under Police control In my experience the District Magistrate, so far from lending undue support to the Police, is apt to regard their proceedings with caution, in some cases verging on distrust It is well understood that in this country, the Police, unless carefully watched and controlled, may become a frightful curse to the people, and it is, of all things, essential to the well-being of a district that the control of the Police should be in the hands of a strong and independent officer In this Presidency, at least, the part which the District Magistrate takes in initiating and directing prosecutions is very small He may initiate prosecutions and in exceptional cases he may give directions as to the manner in which prosecutions should be directed It is necessary that these powers should be exercised by some one, and there is no reason to suppose that they would be exercised with greater discretion by an officer called by another name But proceedings of this kind are, I think, exceptional rather than part of the regular duty of a District Magistrate, and in all such cases his proceedings are subject to review by higher Courts It will, I think, be admitted on all sides that the influence of the District Magistrate over the Police in this Presidency is wholly beneficial and should on no account be diminished

7 But, it may be argued, it would be possible to maintain the control of independent officers over the subordinates in different departments, even if the work were divided I do not think this would be so The great advantage of the position of the Head of the District is that having to look after so many branches of the administration he is able to deal impartially with each, and does not become infected with that departmental zeal which often carries men, otherwise sensible, into extremes He is therefore able to stand between the departmental officers and the people, and to prevent the former in their eagerness for good results, and thoroughness, from pressing too hardly on the latter A diminution in the powers of the Head of the District must necessarily result in strengthening of the power of the Departments, which in my opinion are quite strong enough already Thus if the Head of the District ceased to exercise any functions as a Magistrate and retained all his authority over the Police, he would be much more closely identified with the working of the Police than he is at present Instead of being, as at present, merely a controlling officer, he would tend to become the active head of the Police, and his point of view would be entirely altered There would then be no one to exercise that independent control over the action of the Police which in this country is so necessary Magistrates sitting merely as Judges, with eyes and ears closed to everything except that which passes in their Courts, would certainly be absolutely powerless to exercise any efficient check upon the proceedings of the Police I notice that some authorities hold up the system in force in the Presidency Towns as an example for imitation in the districts They would probably be the first to disclaim any desire to increase the power of the Police in the districts, yet that would be the certain result of the introduction of the system which they approve The power of the Police in the Presidency Towns is dangerously great, but there it is, to a certain extent, safeguarded by conditions which do not exist in the districts, and any proposal to establish Police authority in the districts in such a form should be regarded with great distrust The advantage of having, in the Head of the District, an officer who, while not of any one of the departments of the administration, and being, therefore, free from departmental bias, exercises supervision over all is so great, that it should outweigh all possible objections

8 The instances of abuses to which it is alleged the present system has given rise, are hardly to the point In some of them it is not apparent that any serious wrong or injustice was done Others are cases of the misuse or abuse of power or of the wrongful assumption of power such as might arise under any system which could be devised As long as men are found who are wrong-headed, foolish, bad-tempered, or vindictive, such cases must occur The test of good administration is whether when such cases do occur there are means of redress, and the cases quoted show that the means of redress are ample But even if it were

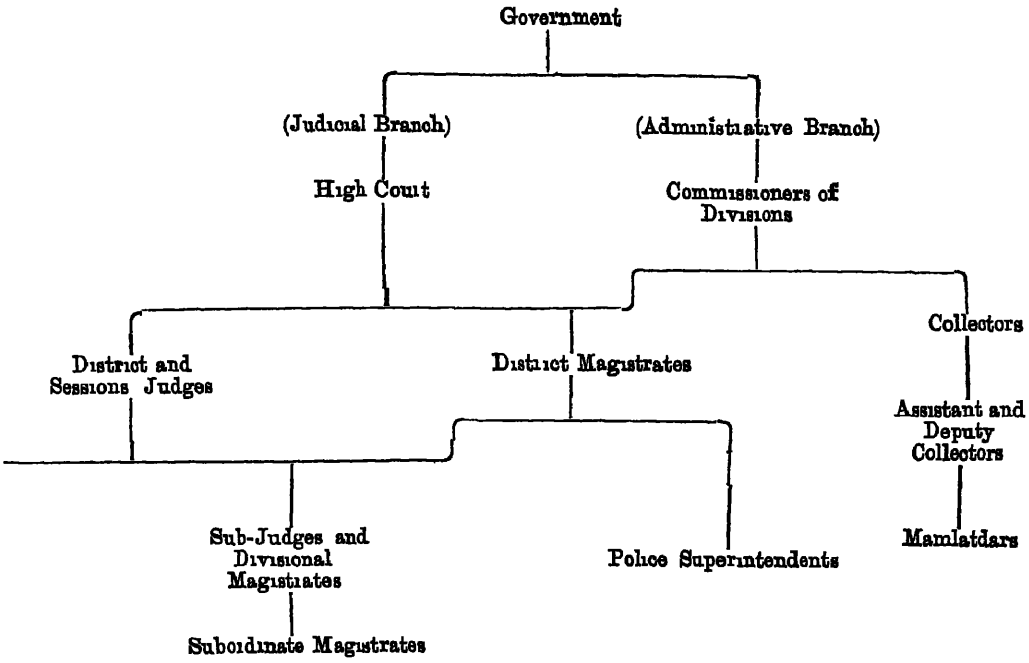
admitted that these instances were the direct result of what is called the union of judicial and executive functions, they would be very far from proving that they represent the necessary or general result There are in all twenty cases covering a period of eighteen years It is said that these are only a few selected out of many, and those only which came within the knowledge of Mr Ghose On the other hand it is evident that in a matter which has been taken up with so much zeal, all the cases which were considered to be strong have been brought forward And Mr Ghose's acquaintance with the members of the Calcutta Bar must have placed him in a position to ascertain the facts of all cases which may have come to the knowledge of others From the weakness of some of the cases adduced, it may be conjectured that there is not much worse behind, and it may therefore be presumed that these instances represent the worst that can be said with regard to the practical working of the present system Against these may be set the numerous cases, of which the district records are full, in which the Head of the District has used his influence and authority to prevent extortion and oppression Every one who has had much experience of district administration will remember such cases Isolated instances of abuse of authority cannot alter the great fact that it is the authority of English officers alone which protects the people from tyranny as unscrupulous and rapacious as any which existed, or to this day exists, under native rule, and, in order that this authority may be exercised, it is essential that the Head of the District should be in a position to watch all branches of the administration and to interpose promptly and effectually when interposition is necessary

9 Two schemes have been put forward for effecting what is described as the separation of judicial and executive functions They differ widely, and only agree in not, in the slightest degree, effecting that which it is intended they should effect One, suggested by Mr R C Dutt, has been accepted by the "Indian Parliamentary Committee" and has secured the approval of Sir Richard Garth The leading feature of this scheme is that "the District Magistrate should be relieved of his judicial duties, which schould be transferred to the District Judge," and that "the subordinates of the District Officer (ex-District Magistrate), who will continue to perform revenue and executive work, only will remain under him, while those of his present subordinates who will be employed on purely judicial work should be subordinate to the Judge and not the District Officer" Now it is clear that, if all the powers of the District Magistrate were transferred to the Judge we should have in the Judge-District Magistrate an impossible monster, who would unite in himself judicial and police authority to an extent hitherto unknown Mr Dutt proposes, however, that the Criminal Procedure Code should be recast "so as to relieve the District Officer and his subordinates of judicial powers in criminal cases and to vest them in the District Judge and his subordinates" The whole effect of the scheme will, therefore, depend on what Mr Dutt means by the phrases "judicial duties," "purely judicial work," and "judicial powers in criminal cases" Is the power to command an unlawful assembly to disperse, and to disperse an unlawful assembly by Civil force included in these phrases? Or the power to order the Police to investigate offences? Or to record statements and confessions during a Police investigation? Or to require security to keep the peace and for good behaviour? Or to make orders in possession cases? Or to receive and pass orders on Police reports in cognizable cases? Or any of the powers which a District Magistrate and his subordinates exercise in the course of investigations and inquiries, and for the purpose of keeping the peace and preventing crime? Mr Dutt does not explain and, until he does, it is impossible to say what the precise effect of his scheme would be It is astonishing that the "Indian Parliamentary Committee" and an ex-Chief Justice of Bengal should seriously recommend for adoption proposals in which the real practical issues have been carefully avoided One thing, however, is certain The powers of the District Magistrate and his subordinates transferred to the Judge-District Magistrate and his subordinates would either be strictly limited to the *trial* of criminal cases or they would not If they were, then things would remain very much as they are If they were not, then the Judge-District Magistrates would be invested with powers of inquiry and investigation which would give them control over the Police, and *pro tanto*, would become executive officers And this under the pretence of separating judicial and executive functions

10 The second scheme, which has been put forward by the Honourable Mr Mehta and accepted by the Bombay Provincial Congress, differs in principle from that suggested by Mr Dutt Here it is fully recognised that, for the protection of the people, the Police must be under the control and supervision of the Magistrates, and I believe the ablest members of the Congress Party in this Presidency would repudiate the idea of diminishing or dividing the authority of the District Magistrate, as it now exists The objection taken in this Presidency is to the exercise of magisterial powers by officers who are, at the same time, responsible for the collection of the revenue It is argued more especially that offences under the Special Acts dealing with such subjects as Forests, Salt, Opium and Abkari cannot be fairly dealt with by Magistrates, who, as Revenue Officers, are interested in the working of the Acts. The argument is plausible, but, as I have endeavoured to show, the bias of the Magistrates is, as a matter of fact, rather against than in favour of Government in proceedings under these Acts However, starting from this argument, the Honourable Mr Mehta has proposed that, instead of one District Magistrate and Collector, there should be in each district a District Magistrate and a Collector, that the Subordinate Judges should be appointed First Class Magistrates, and that the necessary number of Second and Third Class Magistrates should be found by taking officers who, under this arrangement, can be spared from the

5

General District Staff The result of these arrangements may be seen at a glance in the following diagram .—



Apart from the unnecessary creation of separate District Magistrates, who, in matters relating to the control of the Police, will still be subject to the orders of the Commissioners, the great flaw in this scheme is the position of the Sub-Judge-Magistrates As Civil Judges they will be subordinate to the District Judge, as Magistrates to the District Magistrate, who himself is only subordinate to the Sessions Judge expressly provided for in the Criminal Procedure Code This arrangement would not, I think, tend to smoothness of administration Again, the Sub-Judge-Magistrates would, as Magistrates, have Police powers, so that the arrangement, made professedly for the purpose of separating judicial and executive functions would have no such effect If there is any distinctly executive function it is the control and management of the Police, and it is, in Bengal, evidently considered to be the most important executive function Yet it is proposed to transfer this function to officers who are already Civil Judges When a certain principle is invoked for the purpose of advocating changes it is reasonable to expect that the changes shall embody that principle As regards the efficiency of the administration, the effect would, in my opinion be injurious It is said that the Sub-Judges, having a more thorough knowledge of law than the present Magistrates, will dispose of cases more efficiently Even in the disposal of cases a knowledge of law counts for very little in comparison with sound common sense, and the knowledge and judgment acquired in mixing with all sorts and conditions of men But the disposal of cases is but a part of the duties of a Magistrate, and with regard to all measures for the preservation of the peace, the prevention of crime and the control of the Police, the present peripatetic Assistant and Deputy Collectors, and Mamlatdars are far more efficient than sedentary Sub-Judges can ever be It is even better to prevent offences than to try well offences which have been committed Finally I would point out that under the proposed system no district would ever have more than *one* European Magistrate—the District Magistrate—and in many cases there would not be even that one Over wide areas of country the Police are the only armed and disciplined force upon which we can rely for the preservation of peace and order Times may come when the maintenance of British administration in large tracts may, temporarily, depend entirely upon the influence of the District Magistrate and his subordinates over the police That influence has in my opinion been greatly, perhaps dangerously, diminished in this Presidency by the appointment of an Inspector-General of Police, and it would be bad policy to diminish it still further, as it will undoubtedly be diminished if the Police powers exercised by magistrates fall exclusively into native hands I should consider such a state of affairs to constitute a grave political danger

11 To the questions stated by the Government of India I would reply—firstly, that the existing system has not, within my experience, led to any abuses which would not be equally likely to occur under any other system, and secondly, that the existing system is eminently calculated to secure the well-being of the people and should not be altered

S G P I, Delhi—No 258 H D.—12 8-13.—100

Appendix VII.

No 1198A —D , dated the 29th June 1901

From—C E Buckland, Esq , C I E , Officiating Chief Secretary to the Government of Bengal,

To—The Secretary to the Government of India, Home Department

I am directed to acknowledge the receipt of your letter no 523, dated 31st March 1900, forwarding a copy of a despatch, dated the 3rd of August 1899, from the Right Hon'ble the Secretary of State for India, and of the memorial enclosed therein on the subject of the separation of judicial and executive duties in India In reply, I am to submit the following report of the Government of Bengal on the subject, and to forward the opinions of the experienced officers and non-official gentlemen who have been consulted by this Government

Judl A , Mar 1900, nos 295—296

2 The Lieutenant-Governor does not propose to recapitulate the history of this question, which is fully known to the Government of India It is sufficient to mention that the discussion, which lasted from 1854 for five years, resulted in the final orders passed by the Secretary of State in his despatch of the 14th of April 1859, in which he sanctioned the union of the offices of Magistrate and Collector in Bengal on the ground of its success in other provinces, and pointed out the fallacy of Sir J P Grant's argument against it The state of things to which Sir J P Grant and those who were agreed with him objected at that time, has long since passed away, but the catchwords which were used in the controversy,— and had indeed been used so long before as 1837-38,—that the functions of criminal judge should be dissevered from those of thief-catcher and public prosecutor, have never been forgotten, and, though their force and applicability have long since ceased throughout India to hold good, they have formed the basis of the agitation which is still kept up that a full and complete separation should be made between judicial and executive functions However anomalous the combination of thief-catcher with judge was in former times, the office of District Magistrate has been so altered by legislation that this description can no longer be applied to it , and the inference that the complete separation of judicial from executive functions is at the present day either necessary or desirable is directly based on a misrepresentation of existing circumstances

3 The memorial aims at nothing less than a complete severance, in officers of all classes and grades, between judicial and executive powers and functions The arguments upon which this request for full separation is based have been summarised in the 12th paragraph, and the objections which it is anticipated may be raised against the proposed separation of functions have been noticed in the 15th paragraph In some of the papers now forwarded these arguments and objections have been dealt with in detail The advocates of separation are understood to object mainly to two items in the District Magistrate's position—one, that he, being the executive head of the district, with direct control of the police, has the power of trying cases himself, the other, that the Subordinate Magistrates, who try the great majority of cases, are directly under him, receive orders from him, and look to him for such reports on their conduct and capacity as may expedite their promotion The points raised by the memorialists have been reduced in your letter under reply to two main questions *firstly*, how far the combination of executive and judicial functions in the same hands actually leads to abuse, whether there is any practical evil to be remedied, and if so, of what nature and degree it is, *secondly*, whether there are any, and, if so, what, considerations on the other side, which must be set off against such abuses as may have occurred, and which tell in favour of retaining the present system, and on which side the balance of advantage lies His Excellency in Council has desired that the matter should be examined on the broad ground of general administrative expediency If it can be shown that the present system, though somewhat anomalous according to strict theorists, practically answers well under the existing circumstances of the country, and that it has certain political and financial advantages,—an aspect of the case which the memorialists omit to consider —the force of any theoretical argument for a change will be greatly weakened In the minute of the Hon'ble the Chief Justice of Bengal the issue is narrowed to its proper limits, *viz* , "if those who are responsible for the Government of India say that, in the interest of good and successful government, the union of judicial and executive functions in one and the same officer is essential, there, so far as the Judges may be concerned, is an end of the matter" The practical point really at issue is whether, under the system of administration of justice in India, an accused person obtains a fair trial or not This is the main object of the whole Code of Criminal Procedure and to this end the efforts of the Legislature have been continuously directed

4 The system previously in force, to which objections were taken in the discussion of 1854-59, has been described in Sir Henry Prinsep's minute of the 29th March 1901 The present relations between the District Magistrate and the Police on the one hand, and between the District Magistrate and the Subordinate Magistrates on the other hand, have been carefully laid down in successive revisions of the Criminal Procedure Code, with the express object, under the guidance of continuous experience, of preventing abuses of the system Since the creation in 1861 of a separate department of Police, the District Magistrate is still the Chief Police Officer in a district in respect to the maintenance of peace and the repression

of crime, but his other multifarious duties prevent him from attending to the details of investigation of crime as he used to do under the system against which Sir J P Grant wrote The District Magistrate has more and more ceased to have direct and close control over the work of the police, and has ceased to act judicially as a Magistrate except in few and rare instances The Criminal Procedure Code of 1898 carefully defines the duties of a Police Officer in the investigation of crime, and the powers of a Magistrate in the course of an investigation The Code (section 556) declares a Magistrate to be disqualified from trying or committing for trial any case in which he is "personally interested," an expression which has always been liberally interpreted by the High Court, and though it enables a District Magistrate to take cognizance of an offence otherwise than upon complaint of police report, and upon information received by him from some other source, or upon knowledge or suspicion that such an offence has been committed (section 190), it requires that, on the appearance of the accused, such Magistrate shall inform him that "he is entitled to have the case tried by another Court", and on objection taken the case must be transferred for trial to some other Magistrate (section 191) The Code also enables any party to obtain an order from the High Court transferring a case if it can be shown that a fair and impartial enquiry or trial cannot be had in such criminal Court (section 526) None of these safeguards existed under the system which was the subject of controversy before the Secretary of State's decision of April 1859 The outcome of them is that the direct use of the District Magistrate's judicial powers in trying a case in which he has taken an active personal interest is practically impossible

The Code has been supplemented by orders to the Lieutenant-Governor declaring the relations of the District Magistrate to the Police, and directing what matters concerned with crime should be reported to him The District Magistrate has been declared to be entirely responsible for the peace and criminal administration of his district, and to have the general control and direction of the Police But he does not receive all crime reports and diaries from the Police as under the previous system His numerous duties prevent this The greater portion of the work of investigation and detection is left to the District Superintendent of Police The Police are required to submit to the Magistrate special reports of certain specified classes of offences, to report any other cases he may call for, and to carry out his orders But except in these serious cases he does not receive special diaries, *i e*, reports of the course of an investigation, so that he is not in a position to become acquainted with what has taken place until the final report of an investigation into the case is placed before him, or some other competent Magistrate, for final orders The serious offences in which the District Magistrate receives special reports would be committed by him to the Court of Session, if he held any judicial enquiry The interference of the District Magistrate in the course of such investigations would not act prejudicially to the administration of justice or in any way prevent a fair trial for the trial would be held by the Court of Session In practice the majority of the police cases sent up for trial come to the District Magistrate and are distributed by him to his subordinates for trial without his knowing anything about the facts

It must be assumed that police reports of the commission of serious offences require the orders of some Magistrate, because it would be exceedingly dangerous if a case could be dropped on the opinion of an investigating Police Officer "Such control by a Magistrate is certainly not mischievous but most salutary," says Mr Justice Prinsep, "and it is in accordance with our judicial procedure," which enables a superior judicial officer to require that further enquiry be held (section 437) or even a commitment be made (section 436) when it appears that an accused has been improperly discharged by a Magistrate

It has also been described in the papers how a District Magistrate is invested with certain powers under Chapters VIII, X, XI and XII of the Code, to act in the interest of the public, with a view generally to the maintenance of law and order It can hardly be asserted that such powers could be more safely reposed in any other officer than the District Magistrate or Sub-Divisional Magistrate, or Magistrate of the first class, in whom they are vested in the mufassal

To summarize, the main result of the provisions of the Code is that the District Magistrate, who does very little judicial work himself, is expressly debarred by law from trying or committing cases in which he is personally interested He may exercise certain judicial as well as executive powers in preserving the peace of the district, in an emergency he is available, as head of the district, to try as a judicial officer any intricate and difficult case, not necessarily a police case His relations with the Subordinate Magistrates of the district consist of supervision, *i e*, inspection and control, with appellate powers in cases tried by Magistrates of the second and third classes The Lieutenant-Governor sees in the exercise of these functions nothing to interfere with the administration of justice, or to prevent an accused person from obtaining a fair trial, and the legislature in its repeated and sometimes extensive revisions of the Code of Criminal Procedure has been satisfied that no radical alteration is necessary in the system which it introduced in 1861

5 In the papers before the Lieutenant-Governor it has well been pointed out that, in the consideration of this question, one of the first things is to decide what are the Judicial functions as distinguished from the executive functions of a Magistrate Judicial functions, it has been rightly said, consist in the recording of evidence in Court, in deciding thereon, in hearing appeals, and in confirming, revising, or quashing proceedings In addition to these judicial functions proper, the higher Courts exercise certain powers, not essentially judicial, of inspection and control, and of calling for statistical information and reports The only judicial functions proper which a Magistrate exercises, consist in presiding at trials, either in original

cases or on appeal from Subordinate Magistrates, or in hearing evidence before he applies the preventive sections of the Code of Criminal Procedure As has been said, and as is universally admitted, the District Magistrate himself tries very few original cases, but it is, in the Lieutenant-Governor's opinion absolutely essential that he should retain the power of trying cases whenever it is requisite for him to do so It is the possession, not the constant exercise, of his highest powers which gives him the influence necessary to the maintenance of his position and authority as the representative of Government The cases which he would so try would ordinarily be those in which a European British subject is accused, or some crime of special character In such cases the Magistrate would ordinarily hear the case for the purpose of committing it to the Court of Sessions or to the High Court, so that his proceedings would not have any finality, and he would be only doing the work which any other Magistrate would do, should the separation of functions be carried out There many also be cases between powerful local parties, which the District Magistrate is the proper person, and is regarded by native feeling as the proper person, above all suspicion, to decide The question has been seriously discussed whether the District Magistrate should not be relieved of his criminal appellate functions, so that the appeals from Subordinate Magistrates with second and third class powers should lie to the District Judge, and not to the District Magistrate Arguments can be advanced on either side of this question In some districts the District Magistrate has to spend a considerable portion of his time in hearing such appeals to the detriment of his executive work On the other hand, it may be said that by these appeals the District Magistrate is kept in touch with the criminal work of his district and of the various Subordinate Magistrates, that he so far relieves the District Judge of a quantity of lesser appellate work, that it is a good training for the officer himself to exercise his mind judicially, and that a remedy is open to any person aggrieved, by motion, if not by appeal, to the High Court The Lieutenant-Governor has come to the conclusion that no necessity has been established for relieving the District Magistrates of their present criminal appellate work Again, in the exercise in the preventive powers the District Magistrate has the means of maintaining peace, of suppressing crime, and protecting the people and property The ever-present possibility of agrarian disturbances, of religious or political excitement, of violent crime against person and property rende s it essential that some officer should possess such power, and it is obviously right that the District Magistrate, as being responsible as District Officer for the peace of the district, should have them rather than the District Judge, who is not responsible The argument which has been sometimes advanced that the Magisterial powers of a District Officer may be taken away —because Divisional Commissioners are not vested with magisterial or judicial powers, and their prestige does not suffer, nor is their authority weakened,—is based upon an error The Commissioners do not require judicial powers in criminal matters, just because they are not, as Magistrates are, primarily responsible for the maintenance of peace and order in their districts The Divisional Commissioners have in fact judicial powers when they deal with appeals of all sorts, but their prestige depends rather on their experience, their power to administer the policy of Government over large areas, and their position as the advisers of Government

6 All the other functions which the District Magistrate exercises in connection with crime appear to the Lieutenant-Governor to be Executive functions such as are exercised by a Magistrate in any country But in India it has always to be remembered that public feeling on the subject of crime is not the same as in more civilized countries, the officers of the law are thwarted, information is withheld, the criminal is assisted, false cases are concocted, false evidence is fabricated In India, as has been frequently remarked in the correspondence, theft is widespread among the rural community, and dacoity, which is still a common crime in India, is unparalleled in England With all this mass of crime weighing upon the people, the temperament of the native Subordinate Magistrates nevertheless gives them a bias in favour of the accused The bias is a natural one and will always be sympathized in by the Englishman But, if the Subordinate Magistrates are allowed absolute freedom whether they will enforce the criminal law or not, it is a matter of experience they will not do so according to the standard which English experience demands for the administration of justice Even as matters stand, it is the deliberate statement in the papers of one of the best and most cautious Magistrates of the province that it is all but impossible to get a conviction in Bengal of a rich man for any offence whatever A District Magistrate must have powers to cope with these difficulties As a Magistrate it is his primary duty to make constant inspections of the work of the Subordinate Magistrates throughout his district There can be no doubt of the necessity for such inspections Much of the work was timid, dilatory, unsound, entirely different from English ideas of the administration of justice The Deputy Magistrates in the mufassal were (and some still are) very greatly disposed to prolong the trial of their cases unnecessarily by granting adjournments needlessly, by want of proper attendence in Court, by erroneous procedure, and by admission of arguments at unnecessary length, not a few are constitutionally unable to pass adequate sentences in cases of serious crime These faults have been greatly reformed by dint of the constant inspection by Magistrates, and by the periodical examination of their registers of criminal cases and the records of particular cases Again, many of the subordinate Magistrates are junior officers wanting in experience, who require—as many of them would doubtless acknowled—the advice and guidance and the support of the District Magistrate From acquittals there is, very properly, no appeal, but it is always simpler and easier to acquit than to convict, and, without this constant inspection by some superior officer, it would never be known how far the tendencies of indolence and benevolence were not leading to the wholesale discharge on society of those who prey upon it, and the chief of the sufferers are the dumb millions of the poor and the helpless It may be said that

this inspection could be done as well by a District Judge as by a District Magistrate It is quite certain that it would not It would not be initially possible until the number of the District Judges was enormously increased, but, when that was carried out, the inspection would not be done Inspection is the *raison d'être* of District Magistrate, it is not of the District Judge It is the traditional function of the Judge to arbitrate, not to ferret out facts And it is the Magistrate, not the Judge, who is responsible for the peace and order and happiness of his district It is sometimes alleged that the Subordinate Magistrates are so dependent upon the good opinion of the Magistrate as District Officer that the exercise of his powers of supervision and control not merely gives an injudicious District Magistrate the opportunity of directly interfering with the conduct of cases, but also indirectly affects the judicial action of the Subordinate Magistrates While it is admitted that the power of direct interference can be checked by the intervention of the Hight Court and the Executive Government, it is asserted that the Subordinate Magistrates, alive to the importance to them of their superior's favourable judgment, unconsciously adapt themselves to his unconscious bias, with the result that, though they very seldom wittingly do an injustice, criminal trials are not conducted in an atmosphere of cool impartiality The Lieutenant-Governor takes entire exception to the theory that the supervision of the District Magistrate leads to injustice Such supervision should be and is confined to indicating faults of procedure, procrastination, errors in judgment in the past, and is not directed to procuring convictions in particular cases The head of any Government would take very serious notice of any direct influence improperly exercised, and there is no evidence whatever that the Subordinate Magistracy exhibit a tendency to convict when they ought to acquit The Lieutenant-Governor considers, therefore, on this ground not only that no change in the Executive functions of the District Magistrate with regard to criminal work is called for, but that a transfer of the duties of inspection to the Judge would have the most injurious consequences

Another reason for not making over executive criminal work to the District Judge has been well suggested At present he deals with the civil and criminal cases that come before him from an absolutely independent position He is aware of nothing connected with the case until the commitment or the appeal reaches him Should he come to be mixed up with the preliminary investigations and trials in the lower Courts, or undertake systematic inspection, he would have to issue orders and express opinions which would be alleged to indicate a bias on his part and might be brought up at subsequent stages of the case, and objection could be taken to a District Judge trying as a Court of Session cases which his subordinates had dealt with under his control, If confidence were diminished in the absolute independence and impartiality of the District Judge, it would be a serious blow to the administration of justice.

7 The main objection which has been taken to the adoption of a scheme for the separation of Executive and Judicial functions is that it must tend to weaken the authority of the District Officer, and Sir John Woodburn must here express his deliberate opinion, founded on the experience of his whole career, that any change which could entail such consequences may be fraught with the most serious consequences to the administration of the Empire The history of the subject shows that the main principle upon which the mufassal administration of Bengal was after long discussion established was that it should conform to the Oriental idea of the centralisation of power in one individual The Lieutenant-Governor has no hesitation, in spite of the various comments which have been made on this principle, in recording his adhesion to it Even the Police Commission of 1860, when advocating the complete severance of executive police from judicial authorities, considered it "at present inexpedient to deprive the police and public of the valuable aid and supervision of the District Officer in the general management of police matters" Throughout this controversy there is no principle which has received more general acceptance than that laid down by the highest authorities that the position of the District officer must be in no way impaired There is no need to cavil about the use of the word "prestige" as attached to the District officer The practical administration of the country requires that there should be at least one officer in each district embodying the authority of the Executive Government and vested with the powers necessary to enforce the responsibilities imposed upon him There must, in the circumstances of the country, be a local head of the district, distinctly and indisputably the central figure, to whom all will turn in times of danger and emergency, and round whom all the forces of law and order will rally No officer can attain such a position if he be deprived of the powers hitherto considered necessary for its maintenance Apparently the memorialists themselves would admit that a District Officer of some kind is an administrative necessity, and some, at least, of the advocates of change accept it as an essential condition that the power, influence and authority of the District Magistrate must be left unimpaired

Judl 3rd Octr 1890, nos 35—38

8 It has been, indeed, contended that the District Magistrate is not now the centre of all authority and that there are various departments of the public service which are not under the control of the Magistrate as District Officer The Lieutenant-Governor does not deny that in several departments the District Officer is not all-powerful, and that he has only a limited power of interference and control, but it may be safely asserted that the Distrct Officer, from his position, as combining in himself a number of important offices, is able to exercise a considerable influence on all the departments of the public service which are at work in his district and benefit by whatever attention he can pay to them, by the authority concentrated in him, the District Officer is enabled to ensure the co-operation of all departments

to an extent which would be unattainable if his limited connection with them should be terminated The immense development of work in all branches within the last 50 years renders it quite impossible for a District Officer to do everything himself, or even through his assistants With the Imperial Departments of the Post Office, Telegraph, Finance, Railways, he has necessarily but little in common, but be is always liable to be called upon to give his opinion upon such subjects, based upon his knowledge of his district His main duties are the maintenance of the peace as Magistrate and realization of the revenue as Collector The powers which have been conferred upon him are those which have by experience been found to be necessary to enable him to enforce the public demands and to maintain the peace It would be impossible to insist on his responsiblity should these powers be taken away It is unintelligible how it can be supposed that an officer, vested with executive functions only, and the power of only initiating and conducting prosecutions, could be held to possess powers sufficient to enforce his will or the orders of Government If the District Office were made unable to punish for disobedience of orders, and had to prove the disobedience judicially before "a purely judicial officer who has no other relations at all to the people and who passes his whole life in a Court," the District Officer would not be master in his own District He would have the name without the substance of power On the particular question now under discussion the opinion of Sir Fitz-James Stephen has a weight second to none in the whole of this long discussion Not one of the distinguished lawyers who have taken part in it can pretend to his reputation for clear and practical statesmanship, and his opinions are so conclusive on the issue that no apology is needed for reproducing them here —

I have already observed that it seems to me essential that the position of the District Officers should not be materially weakened, but if their whole judicial powers were taken from them and confided to purely judicial officers, nothing would be left in their hands except miscellaneous executive functions They would have the duties of Engineers, Health Officers, Way Wardens, &c, but they would have no authority which would excite in the minds of the people at large either hope or fear in regard to them, and they would certainly be deprived of one most effectual way of becoming acquainted with their habits and feelings The exercise of criminal jurisdiction is, both in theory and in fact, the most distinctive and most easily and generally recognised mark of sovereign power All the world over the man who can punish is the ruler Put this prerogative exclusively in the hands of a purely judicial officer who has no other relations at at all to the people, and who passes his whole life in a Court, and I can well believe that the result would be to break down in their minds the very notion of any sort of personal rule or authority on the part of the Magistrates

I do not think that, situated as we are, the law can ever be carried out effectually, except in one of two ways, namely, either by the strong personal influence of Magistrates, known to and mixing with the people, or by an enormously increased military force In a few words the administration of criminal justice is the indispensable condition of all Government, and the means by which it is in the last resort carried on But the District Officers are the local governors of the country, therefore the District Officers ought to administer criminal justice Also it is necessary that the District Officers should have personal and friendly relations with the people But this, under the circumstances of British India, can be secured only by investing them with miscellaneous executive functions Therefore, it is necessary, upon the whole, that the District Officers should both administer criminal justice and discharge miscellaneous executive functions

If confirmation were needed of an opinion so authoritative, it will be found in Sir John Strachey's book on India, 1894, page 287 As Judicial Commissioner of an Indian Province, as well as a Lieutenant-Governor, he had opportunities of seeing all sides of the question, and this is the conclusion of the experiences of his career —

We often have demands for the more complete separation of executive and judicial functions in India, but they are demands based on the assumption that because this is good for England it must be good for India also There could be no greater error The first necessity of good administration in such a country as India is that it should be strong, and it cannot be strong without the concentration of authority In the every-day internal administration there is no office so important as that of the Magistrate and Collector He is one of the mainstays of our dominion, and few steps could be taken in India which would be more mischievous and dangerous than to deprive him of those powers which alone enable him to maintain his position as the local representative of the Government

9 It has been noticed [paragraph 12 (vi)] by the memorialists that appeals from revenue assessments are apt to be futile when they are heard by revenue officers, and elsewhere objection is taken to the union of Revenue Collector and Appeal Court in revenue cases The imputation is of course that injustice is caused to the revenue-payer by this system The memorialists suggest no substitute for the present arrangement The reply, I am instructed to submit, is that revenue appeals are disposed by revenue officers, because they alone possess the requisite revenue experience, and it is their departmental business to enforce the rights of Government in revenue matters It is always open to the revenue-payer to move the Civil Courts to set aside the decision of the revenue Courts, and the Law Reports could prove that cases in connection with the working of the Certificate Procedure under the Public Demands Recovery Act have come before the High Court. It may be observed that Mr R C Dutt's scheme would combine in the District Officer the present revenue powers of the Magistrate-Collector with his police powers, but he has made no suggestion to provide for the memorialists' objection to revenue appeals being heard by

revenue officers If the civil Courts, already overburdened with work, have no time to try them, and the revenue authorities are not to be allowed to entertain them, a third officer, *i e*, a revenue appellate authority, would be required for each district not only would the cost of the administration be greatly increased, but the obstruction to public business would be intolerable If the argument is to be admitted that a Collector, or a Commissioner of Revenue, or a Member of the Board of Revenue is, in consequence of his designation and duties, to be considered disqualified to hear revenue appeals, it would be necessary to provide that all revenue appeals should be heard by some judicial authority As it is the tendency of Courts in practice to presume everything in favour of the revenue-payer against the Government, not only would the difficulty of collecting the Government revenue be greatly enhanced, but its very safety would be endangered That no such change is necessary is proved by the number of revenue appeals annually decided in which the decision is given by the Revenue authorities in favour of the appellants The memorialists in their second paragraph have quoted, apparently as advancing their case, a Regulation of 1793 which was specially directed against the combination in the same officer of revenue with judicial duties It is therefore hardly consistent on their part to recommend a scheme such as Mr R C Dutt's, which has as one of its main principles the combination of revenue and police functions in one officer That a combination of these powers may lead to an abuse of authority was shown in the Maguire case, but no inference justifying an important change can be drawn from a solitary instance

Judl A, July 1900, nos 189—191

10 The fact that the system which obtains in Calcutta differs from the mufassal has been taken as an illustration of the necessity of differentiating the system of administration to be applied according to circumstances In Calcutta there is no District Magistrate In Calcutta the Commissioner of Police possesses no judicial powers, but he has the whole of the police preventive powers, and discharges a number of executive and miscellaneous duties which, in the mufassal, would devolve upon the District Magistrate It is claimed that, even without judicial powers and without supervising the work of the Magistrates, the Commissioner of Police wields a power, influence, and authority as strong and effective as those of any District Magistrate, and that, therefore, it may be legitimately inferred that, where the local conditions are appropriate, the power and influence of the chief executive officer are not less effective by reason of his not being vested with any judicial functions or with control over the Subordinate Magistrates Because the separation of judicial and executive functions obtains in London and Calcutta, it is urged that the system should be extended in India There could be no greater fallacy the English criminal law differs from the Indian Criminal Code in many important and necessary respects Calcutta and London have no resemblance to Indian districts, Calcutta is an Oriental city only in the sense of being situated in the East, but it is not Oriental in the sense of representing the life of natives of the East It is the capital of a maritime nation, which Orientals are not, it is a city of Englishmen living in the East, with a large native population drawn from all parts of India for purposes of trade, it is a city where the influences of English life and civilisation, modified of course by some circumstances inseparable from Eastern life, are dominant, where large bodies of Englishman live together as citizens, and where, therefore, the civic life and status of the inhabitants are largely affected by English requirements, customs, and system of administration Nevertheless, with all these advantages to support the system of divided authority, it is open to serious doubt whether that system is suitable even to Calcutta The Lieutenant-Governor cannot be always there, and in his absence there is no Governor of the city, and no single authority whom all classes recognise and can refer to in difficulty Twice during the last three years has the question arisen, and on one of these occasions a Member of the Board of Revenue had to be placed in supreme executive authority by the cumbrous device of a notification under the Epidemic Diseases Act So far from the example of Calcutta being a support to the argument of the memorialists, it operates, in the Lieutenant-Governor's judgment, very strongly in the other way

The idea of extending the system of separation of Judicial and Executive functions to some of the most advanced districts has been put forward in some quarters It has been proposed that a change of system might be tried as an experiment in one or more of the districts adjoining Calcutta Unfortunately for this suggestion it would be easy to demonstrate, from the criminal statistics of the 24-Parganas, that the district adjoining Calcutta—the very neighbourhood of the Metropolis—is not so civilised or so amenable to the law as to justify a weaking of the executive power in that district or in any others similarly situated In the statistics of offences against the public tranquility—the class of crime in which the landholders principally come into notice—the Presidency Division has a regrettable pre-eminence The adoption of any such change of system would be altogether unsafe and unsound The memorialists themselves admit that in the more backward districts, experiment in this direction is impossible

11 The memorialists have asserted that the change in the present system is demanded by the general voice of public opinion in India The Lieutenant-Governor must take leave to state that no proof whatever of this assertion is offered, and that such indications of public opinion as are available point altogether in the opposite direction The popularity of the present system of the administration of justice is acknowledged in the papers which accompany the memorial It may be conceded that litigants often have recourse to the law Courts for the purposes of harassing their neighbours and of seeking some improper advantage, but the

fact remains that in the popular opinion justice is obtainable from the Courts, and it is notorious that the people prefer to have their cases tried by the Magistrate himself or an European officer, if possible The confidence which the people repose in the District Officer is proved by the readiness with which they appeal and petition in cases of alleged oppression and wrong It is significant that they always remember best, and remember with an affection, reverence, and admiration that shows their discernment of character, the District Officers who have shown themselves strong, just, and energetic in the exercise of their combined functions It it were true, as alleged, that the people distrusted the Courts because of the combination of executive and judicial functions in the District Magistrate, they would long since have shown their aversion in a decided manner It is to the District Magistrate, not to the District Judge, that the peasant appeals for the remedy of every wrong and the redress of every grievance This is the voice—the voice, however, of a fearless confidence—that he who hath ears to hear in India recognizes universally The Indian National Congress may speak with another voice But they are themselves perfectly conscious that they are in no sense representatives of the people They are a knot of platform gentlemen to whom we listen good-naturedly and sometimes quite seriously and sympathetically, but they say not what the people say, but—which is quite different—what they want the people to say

12 The 18 cases collected by the late Mr Monmohan Ghose have been put forward as illustrations of the abuse of their authority by magisterial officers These cases have been examined in detail in the papers under consideration and in the reports now submitted The Lieutenant-Governor does not propose himself to examine them minutely in this report The statement that they are but typical examples taken from a large number is a bold assertion which requires to be proved The presumption is that the able compiler made his collection as strong as it could be made and the Native Press are not backward in publishing any cases which may appear to discredit the Magistracy The Lieutenant-Governor himself knows of only two others The High Court have expressed themselves unable to furnish such a statement without a laborious and costly search of their records, and it is reasonable to suppose that there would have been no such difficulty had there been any cases of importance on record The utmost that these cases prove, even if we assume for shortness' sake the correctness of the manner in which they have been presented, is that, in the course of 18 years, 18 cases occurred of abuse of Magisterial powers, of which only 4 occurred during the last ten years Even where the integrity of purpose has been unquestionable, the peccant officers have been punished, and the examples of the justice that Government is prepared to mete out, even to the punishment of its own officers, remain as warnings for the future No one speaks with higher experience and authority in this matter than Mr Justice Prinsep His conclusion that such cases are rare and less frequent than they were is entirely borne out by the evidence. No system can be free from untoward occurrences, and in no country are official and judicial vagaries unknown There can be no absolute safeguard against the recurrence of such cases That a few officers have abused their powers, whether through excess of zeal or ignorance, through want of discretion or temper, is not sufficient argument for the condemnation of a system, if that system has in its general operation been found to be adopted to the requirements of the country

13 For it cannot be too clearly remembered that abuses of authority are not confined to the Executive side of the administration The Lieutenant-Governor does not on that account consider himself warranted in passing a wholesale condemnation on the manner or the system under which judicial officers as a body exercise their functions, but one of the very officers whose actions as Magistrate are exposed in the collection of cases abovementioned had to retire on account of his extraordinary conduct as a District and Sessions Judge, and the recent case at Noakhali is not only an example of the judicial abuse of authority, but may be taken as a certain indication of what would happen if the principle of separation of Judicial and Executive functions were carried out to its theoretical conclusions That case showed how a Judge, on more than one occasion, illegally exercised powers which he was aware, or ought to have been aware, that he did not possess It also showed how a Judicial Officer serving under the Government could be insubordinate and contumacious for a long time with impunity, shielding himself under the assumption of judicial independence and asserting without reason that his judicial independence was being interfered with by the Executive authorities The abuse of judicial authority is infinitely more serious than the abuse of executive authority There are two constant tendencies in the English race, to which a constant appeal is made in all this correspondence The one is the habitual check of the exercise of executive power, the other is the habitual support of the exercise of judicial power These are the natural tendencies of a self-governing community Abuse of executive power meets with instant rebuke and control, abuse of judicial authority is corrected haltingly and with hesitation The remedy of the one is prompt and sustained, the remedy of the other is slow and reluctant In a country which is not self-governed, the substitution of judicial authority for executive authority may readily lead under the influence of these tendencies to an entire paralysis of administration It has been observed constantly in the Native newspapers in connection with Mr Pennell's case that it has greatly advanced the question of the separation of Judicial and Executive functions The Lieutenant-Governor apprehends that the Government of India will concur with him that the case proves the very reverse and that no more unfortunate incident could have occurred or more damaging to the principles advocated by the memorialists and those who support them.

Pub A, Mar 1901, nos 389—392

Pub A, April 1900, nos 288—308

14 In the course of the correspondence it has been suggested that the aim of the party whose views the memorialists advocate is to obtain a larger share of the judicial appointments of the country The memorialists make statements (at the end of their paragraph 12) which can have no other meaning but that every judicial officer ought to be a member of the legal profession It will be explained further on how necessary it would be, if any such scheme as that put forward by Mr R C Dutt should be accepted, to increase the number of District Judges, and obviously the number of officers, by whatever name designated, to be entrusted with the discharge of subordinate judicial functions would similarly require to be enlarged The conclusion of the memorialists though not expressed is implied that trained lawyers should be supplied to all the Courts of India, and that they should be found in the legal profession in India The claim has been advanced by the organs of the Indian National Congress that the whole judiciary should be independent of the Executive Government and be under the High Court, should consist of members of the legal profession, and exclude the members of the Civil Service The European members of the Indian Bar would not be numerous enough to fill the judicial posts The Lieutenant-Governor does not allege that the memoralists foresee the result if all the claims put forward by them should be accepted, but the Government cannot conceal from itself what that result would very clearly be the transfer of the judicial work of the country would fall into the hands of the native members of the legal profession—gentlemen who, whatever their other qualifications, are imbued with the narrowest notions of technical law, and are constitutionally in opposition to the Executive The Lieutenant-Governor has no doubt as to the judgment of all competent opinion on the desirability of a change of that sort, or on the political consequences of giving the jurisdiction over the executive, which is the necessary appenage of their position, to a body of Judges constituted in this fashion Lawyers are most estimable persons and most useful in their own sphere, but in no country is the Government placed in their hands, and in India it is the judgment of the people themselves that we have allowed the lawyers an excessive and injurious predominance in our system It is their own caustic remark that the administration of India is a "Vakeel ka Raj", and the grave question in the interests of the masses is not an extension, but a reduction, of the power and influence of the lawyers If one-half of the Subordinate Executive Service, as well as the whole of the Subordinate Judicial Service, were placed under the immediate jurisdiction and control of the Judges, it is obvious enough what the effect on the Government of the country would be

15 In the sixth paragraph of your letter under reply the Lieutenant-Govenor's attention has been specially invited to Mr Dutt's scheme, and he has been asked to scrutinise its financial aspect and to prepare an estimate of the annual cost involved in adopting it in Bengal It is necessary first to explain what this scheme is Its crudeness has not escaped notice it is hardly creditable to its author's experience Mr Dutt proposes (1) that the District Magistrate should be called the District Officer, be employed solely on executive (including police) and revenue works, and be relieved of his judicial duties, which should be transferred to the District Judge, (2) that the Assistant Magistrate should be employed solely on revenue, executive and police work, and be subordinate to the District Officer, and that the Joint-Magistrates should be employed solely on judicial work, sometimes as Assistant Sessions Judges, and be subordinate to the District Judge, (3) that in each district one-half of the Deputy Magistrates should be employed solely on executive and revenue work, and be placed under the District Officer, and that the other half be employed solely on judicial work and placed under the District Judge (a larger share than one-half of the staff being attached to the one or the other, according to the volume of work), (4) that the District Judge should, in addition to his present duties, supervise the work of Joint-Magistrates and Deputy Magistrates employed solely on judicial work, being assisted by the Joint-Magistrate or a selected Deputy Magistrate in this duty of supervision, (5) that in sub-divisions, the Sub-Divisional Officers should be confined to judicial work and be subordinate to the District Judge, and that Sub-Deputy Collectors, or, in the more important sub-divisions, Deputy Collectors should be employed for the revenue work and such police work as is performed at the sub-divisions

16 To this scheme, simple as it appears, there are weighty objections, besides the objection of the cost which it would entail If it is supposed that the Subordinate Magistrates who are to be employed on judicial work will be less actuated by a desire to satisfy the Executive Government than at present, the idea is based on erroneous premises, as the promotion of such officers must still remain with the Executive Government Again, it is notorious that, even at present, the relations between the Judicial and the Executive authorities at the head-quarters station are often considerably strained in consequence of the disagreement of the authorities regarding official matters, it is equally notorious that at most sub-divisions the Sub-Divisional Officers and the Munsiffs are scarcely on friendly or even speaking terms, and that party strife is thereby engendered to the detriment of official work In paragraph 53 of his Minute of the 30th April 1856 on Police and Criminal Justice in Bengal, Sir Frederick Halliday depicted in forcible language the friction which would be developed in each zilla station and all over every district by the antagonism which would arise between a locally-opposed judicial and executive authority But apart from this question of friction, the result of (1) and (5) in the preceding paragraph to all, the District Officer, and the Sub-Divisional Judicial Officer, and the Sub-Divisional Executive officer would be that they would lose the general experience which is of the utmost value to all officers, whether they are employed on revenue or on judicial duties—the possession of which indeed can alone fit the members of the

Provincial Executive Service for promotion to the higher executive appointments The District Officer and the Sub-divisional Executive Officer would not only lose their position in the eyes of the public, but they would lose the power of enforcing their orders and the orders of Government so that district and sub-divisional administration would soon be paralysed As to (2), the result would be that the District Officer would have the assistance of only the most Junior and inexperienced Civilians from whom he could receive no material help in his revenue and miscellaneous executive duties These young officers would, in a short time, be transferred to Judicial work as Joint-Magistrates, and, being employed as Joint-Magistrates on Judicial work for some time, they would be the less fit to be District Officers under Mr Dutt's scheme, when promotion came to them The officers who, as Joint-Magistrates, had for some time been employed on Judicial work, would be the less fit to be District Judges through want of general experience of the administration of the country In either case the training of the officers would be one-sided and deficient. The idea of employing young Joint-Magistrates of three years' service and upwards as Assistant Sessions Judges to try Sessions cases cannot be regarded as a practical suggestion As to (3), it is well known that the Subordinate Executive Service value the possession of judicial powers and the officers who might be deputed to the executive-revenue branch would, doubtless, feel that they were in an inferior branch of the service, and would become discontented Moreover, the time of the present establishment can be more fully utilised by the combination of Executive and Judicial work than would be possible if certain officers were confined to distinct classes of work At present, by arrangement of work and redistribution as required, the services of the subordinate officers can be fully utilised For instance, much revenue work and correspondence can be done in the intervals of criminal case work under the contemplated scheme of separation, each section would have to be maintained at sufficient strength to meet times of pressure on either side, so that work might not fall into arrears To provide against this result, the establishment of officers at each station would have to be permanently increased The inevitable result of (4) would be that the District Judge, being already generally unable to find time to do his own civil and criminal, original and appellate work, and inspect the Subordinate Civil Courts properly, would either exercise his supervision merely as an appelate Court,—which is an utterly imperfect and incomplete method of control—or would make over this duty of supervising the Court of the Deputy Magistrates and Sub-Divisional Officers to the officers designated so to assist him, so that the supervision would come to be exercised by less experienced officers of lower standing and position than the District Magistrate, who now does this work The change would only be for the worse With regard to (5), the whole system of sub-divisional work would be changed, a system which has been sedulously fostered during the last 40 years with the distinct object of concentrating limited power in the hands of a representative of the Executive Government in all branches other than civil judicial work The Sub-Divisional Officer would have no connection with the administration of the sub-division,—instead of being a peripatetic administrator he would become a stationary judicial officer,—and the revenue work would either be concentrated at head-quarters or would be left to a subordinate not possessed of the authority requisite to secure ready obedience to the execution of his orders It is inconceivable that the revenue, executive police work of a sub-division should be confided to the charge of an officer of the rank of a Sub-Deputy Collector with nobody between him and the District Officer at the Sadar station The suggestion reflects unfavourably on the prudence of its author A bare list of the duties to be performed would expose its absurdity Thus, in the case of every sub-division, it would be essential to appoint an Executive Officer of at least the rank of a Deputy Collector

17 The financial aspect of the changes proposed by Mr Dutt's scheme requires full examination, though it is to be condemned on other grounds The memorialists fail to appreciate that the scheme will be expensive This fact alone shows that the practical effect of the scheme financially has not been thought out with sufficient care As the scheme is based on a theory, its details would have to be carried out in conformity with that theory so as to provide for all the officers required, though at present so many officers are, on account of the amalgamation of duties, not required In the first place, it would be necessary to add 79 Deputy Collectors to the existing staff of the 79 of the 88 sub-divisions in Bengal (exclusive of the Chittagong Hill Tracts) at which there is only one Deputy Magistrate-Collector at present, at an average cost of Rs 400 a month (a salary which would often be exceeded, their cost would be Rs 3,79,200 a year The ministerial establishments for these 79 officers would, at a mean cost of Rs 105 a month for each officer, amount to Rs 99,540 a year A Joint-Magistrate would be required at each of the 45 Sadar Stations Of the 33 sanctioned Joint-Magistrates hardly any are ever available for the duties of that office It would be necessary to add some 30 officers at least to the establishment, half of them at Rs 700 per mensem, the remainder at Rs 900 per mensem The cost would be Rs 2,88,000 a year, and their establishments, at a cost of at least Rs 105 a month, would amount to Rs 37,800 a year At head-quarters it would be necessary to entertain an even number, 2, 4, or 6 Deputy Collectors in all cases Having regard to the sanctioned strength of Deputy Magistrate-Collectors for each Sadar station, it would be necessary to increase the staff by, at least, one officer, with his establishment, costing in each case Rs 105 a month Thus 45 more officers at Rs 400 a month, with their establishments, would cost Rs 2,72,700 a year Mr Dutt has not mentioned it in his scheme, but it would certainly be necessary that there should be a District Judge at each of the 45 Sadar stations There are now 33 District Judges, including the Judicial Commissioner of Chota Nagpur It would thus be necessary to increase the number of District Judges by 12 officers If 6 of these were added to the second grade on Rs 2,500,

and 6 to the third grade on Rs 2,000, the additional cost entailed would amount to Rs 3,24,000 per annum There are two grades of ministerial establishments allotted to District Judges at a cost of Rs 1,025 and Rs 672-8 a month, respectively Six establishments of each grade would cost Rs 1,36,620 a year As both of the Subdivisional Officers—the Judicial and the Executive—would have equal rights to the sub-divisional house it would be necessary to provide accommodation in at least 79 cases at an average cost of Rs 5,000, total Rs 3,95,000, and many of the cutcheries would require enlargement to afford space for the second officer and his staff The cost of these changes it is difficult to estimate The total of the charges estimated above would be Rs 15,37,560 a year, *plus* the initial cost of houses, *viz*, Rs 3,95,000 Supposing that economy could be exercised, in the officers and establishments required, to the extent of 25 per cent, the cost would still be Rs 11,53,395 a year, *plus* the same initial cost of houses

18 Besides the scheme which bears Mr R C Dutt's name, various other proposals either of a comprehensive or of a limited character have been put forward For instance, it has been suggested as abovementioned that the appellate powers of District Magistrates should be withdrawn, so that all appeals from second and third class Magistrates should lie to the District Judge This has already been dealt with Again it is proposed that as a tentative measure, some of the Sub-divisional Magistrates should be set apart wholly for magisterial work, still remaining under the control of the District Magistrate The objections to this have been already indicated It would be unpopular with the Sub-divisional Magistrates themselves, it would necessitate additional officers the partial adoption of the plan as at present makes the officers more generally efficient and is much better for them Another scheme advocates the maintenance of the power, influence and authority of the District Magistrate unimpaired, and would allow him the preventive powers contained in Part IV of the Criminal Procedure Code, but would deprive him of the powers of supervision and control upon which the maintenance of his power so greatly depends, and would make over these powers to a District Judge of inferior status, subject to the distant control of a Divisional Judge (who has yet to be legally created) This change would entirely alter the position of the District Officer For some time there would not be available 46 Judges capable of performing the duties contemplated It is open to great doubt whether the District Judge could make time to do all the inspection work proposed for him, and the objections to inspection duties being made over to a Judge have been stated in paragraph 6 above It is also very doubtful whether the arrangements for the civil judicial work of the district, which would be the result of this scheme, would have the approval of the High Court The scheme, so far as it applies to sub-divisions, is open to most of the objections which have been taken to Mr R C Dutt's scheme The plan of deputing Subordinate Magistrates to solely judicial work for five years at a time would be acceptable to the worst officers, but not to the best, and the High Court and the public would equally resent a plan which would remove from judicial duties officers who had just completed an efficient training in them The plan proposed by Mr B L Gupta is equally open to many of the objections already taken to other schemes, which need not be repeated The division of the Subordinate Executive Service into two branches would result in turning the Deputy Magistrates into Subordinate Judicial Officers dealing with criminal cases all their lives—a very objectionable measure The proposals to render the District Officer's control over the subordinate Magistrates nominal—while leaving that officer some judicial powers—would neither satisfy the memorialists, nor can it be accepted by this Government Mr Gupta would adopt Mr R C Dutt's scheme for sub-divisions, whereas it has been more generally condemned in respect of its application to sub-division than on any other ground It will not escape notice that although the Hon'ble Judges of the High Court are unanimous on the question of principle in the abstract, hardly any of their separate minutes agree as to the application of the principle Sir Henry Prinsep considers the present system the best for an efficient administration until a separate and efficient Police Department is established for the detection and repression of crime The division of the District Magistrate's subordinates into two classes, as suggested by Mr Justice Rampini, has already been shown to be very undesirable His idea that the Sessions Judge, after having been vested with appellate powers from all Magistrates, should transfer back some appeals to Magistrates of the first class would be a change of procedure leaving the practical result as before Whereas Mr Justice Chander Madhab Ghose would leave the District Magistrates no power of supervising the subordinate Magistrates or reporting upon them, Mr Justice Rampini would allow the District Magistrates full administrative control over the Magisterial officers, with concurrent powers granted to the District Judge to report on their merits for promotion Mr Justice Stephen, on the other hand, would not place the Magistracy under the District Judge, as he clearly sees the impossibility of the work being properly done Mr Justice Brett (Mr Justice Piatt agreeing with him) would create a special magisterial service, separate from the executive, or would separate the Magistrates from the detective work of the Police In the midst of these varying counsels, the Lieutenant-Governor might be bewildered if he had any intention of proposing any change

19 The Lieutenant-Governor has had under his consideration whether there are any executive orders which he could issue which would prevent the recurrence of such abuses of authority as have undoubtedly occurred in time past He finds a difficulty in doing so for two reasons *first*, that such orders as might have been issued with a view to secure an accused person a fair trial are hardly necessary if proper attention is paid to the Code of Criminal Procedure, especially to sections 191 and 556, and to the rulings of the High Court, *second*, that such episodes arise from the frailties of human nature which manifest themselves in

s,ple of all laws, orders and admonitions Still some good would doubtless be effected by placing on record some principles which would have to be universally observed, *e g*, that a District Magistrate is not to interfere in any way with a Subordinate Magistrate during the progress of a case, that he is in no way to indicate what the sentence or punishment should be, that it is open to the District Magistrate to send for the records in any case, and, after the period allowed for appeal has elapsed, discuss it with the trying Magistrate, etc Such general instructions would doubtless have some effect in the desired direction By the High Court's Circular no 2 of 16th June 1900, District Magistrates are prohibited from issuing general orders in the form of circulars on judicial matters to the Magistrates subordinate to them The Lieutenant-Governor thinks that it would be quite feasible, after communication with the High Court, to point out to the Magistracy what their duties are in detail under the law, with a view to the better avoiding of any possible abuses of authority in future

20 The main questions formulated in your letter under reply have been fully discussed in the preceding paragraphs No Government has ever contended that the present system is a perfect one, but it is claimed for the system now in force that it has practically been a success, and that its advantages are fully recognized by the people at large The evils to which it is liable, through the indiscretion of individual officers, have been grossly exaggerated The likelihood of their recurrence is ever decreasing The present system was substituted for a system which had failed, which the memorialists seek to re-establish with very few limitations, and which we know from experience would in its turn be attended by abuses more grave and more injurious than those which the present system has studiously corrected and reduced The Lieutenant-Governor considers that the present system, though it may be anomalous according to the highest standard of theoretical perfection, is in all essentials as good a system as can be devised with reference to the existing circumstances of Bengal It maintains the indispensable position of the District Officer It provides for a fair trial for the accused person It imposes checks upon the District Magistrate and provides for appeals and motions against his orders It enables him to supervise the work of his Subordinate Magistrates, to see that it is properly performed, to take measures for the preservation of peace and order, for the protection of life and property, for the administration of justice and the prevention of injustice There is no real ground for the insinuation that the District Magistrates habitually interfere with the judicial independence of their subordinates, or that their supervision or control is improperly exercised The Subordinate Magistrates cannot be left altogether free of executive control, and it is not only of importance but necessary that they should endeavour to do their work well The time of the District Judge is already too much occupied to admit of his undertaking more work The District Magistrate has no personal interest in the conviction of any individual accused, otherwise than to see justice done The interference of the High Court and the supervision of Government can be easily solicited and rapidly exercised, and are sufficient to rectify any illegalities or improper sentences, when technical irregularities are committed by officers who are anxious to do substantial justice, they can be set aside if sufficiently serious Theoretically, a perfect system of administration would require the separation of all the departments, Judicial, Revenue and Police, under separate officers of various grades Such a departmental system would be entirely different to that which now obtains and has borne the test of time It would be a radical change in the form of administration in India, and its consequences could not be fully foreseen The cost of such a change would be enormous But the conclusion of this examination of the case is that no such change is necessary or desirable, and that there is no occasion to sacrifice at the altar of theory the good that has practically resulted from, and is still attained by, an efficient though necessarily anomalous system

In short, on the issue, as framed by the Hon'ble the Chief Justice of Bengal, the Lieutenant-Governor, as responsible for the administration of the province, is of the clearest opinion, on the grounds put forward in this letter, that in the interests of good government, *i e*, of general administrative expediency, the union of Judicial and Executive functions in the District and Sub-divisional Officers is at present essential

S G P I, Delhi—No 258 H D—'3-3-13—100

Appendix VIII.

Dated Darjeeling, the 9th July 1900 (Confidential)

From—J Munro, Esq, C B,

To—The Chief Secretary to the Government of Bengal

I have the honour to acknowledge receipt of your letter No 1464 A D, of 22nd June, regarding the question of the separation of judicial from executive functions in Bengal The question is not a new one, its solution has repeatedly engaged the attention of the most experienced and ablest administrators of India I hardly think that there is much that can be added to the views of those able men who have had exceptional opportunities of arriving at a definite conclusion on the subject, but as my opinion has been asked, I have pleasure in recording the results of my experience with reference to the question at issue As one who has had a long acquaintance with criminal administration in India, both in an executive and judicial capacity and who has also had practical experience of the working of the criminal law in England, while serving in the Metropolitan Police as Assistant and Chief Commissioner, as one moreover who for nearly ten years after retirement from public service has been living in very close connection with the people of this country in an entirely unofficial position, I have had opportunities of dealing with the question from different points of view whether as an official or a private citizen, and I note with satisfaction that I am asked to express an opinion "with reference to conditions as they exist in India rather than to any abstract principles or to the practice in other parts of the world"

In more than one passage in the correspondence which accompanies your letter, I find opinions based on the fact that the union of executive with judicial functions does not exist in England, and that therefore it ought not to exist in India There is no doubt as to the fact of the separation of the two functions in England, but it does not follow, as a matter of course, that the system which is current there should obtain in India If this were so, why are our Indian Criminal Codes so different in many respects from the criminal law and procedure in England? For instance, it is part of Indian law that the police should act as public prosecutors in what are known as "cases cognizable by the police" Such is not the function of the police under English procedure, and the fact that it is not so has often been deplored by the English public, but I have not found it asserted that because this practice obtains and is found useful in India it should therefore be adopted in England The law of India as regards, *e g*, the duties of land-holders and their responsibilities in connection with breaches of the peace, the control of bad characters and criminal tribes, the examination of accused persons, the trial of European British subjects, etc, etc, all show that the circumstances of India are quite different from those of England, not merely as regards details of procedure, but with reference to principles of administration But on that account it would be folly to say "the thing is not allowed in England and every man who has read history ought to hope that it will disappear in India" I remember very well that the inexpediency of applying the same principles of criminal administration in Ireland as in India was definitely insisted on in the House of Commons by, I think, the leader of the Liberal Party, when a question arose as to the advisability of appellate courts being empowered, as in India, to enhance inadequate punishments inflicted by lower courts

When the circumstances under which criminal law is administered in India are the same as or similar to those which find place in England, it will be time to say—"The thing is not allowed in England," therefore it is not permissible in India, but so long as the District Officer in Bengal (to quote from an authority referred to by the memorialists is "the representative of a paternal and not a constitutional Government," the *dictum* above referred to will be found totally inapplicable

What then is the existing state of matters in India, with reference to which the question now at issue is to be discussed?

Let me first quote from the late Justice Dwarkinath Mitter, a Judge of the High Court "The History of the Hindu polity is the development of the moral system of Manu The national mind has rested as it were upon his teachings That the moral system of Manu has so long preserved its influence is due simply to the fact that it was precisely adapted to the conformation of the Hindu mind and its surroundings To understand Manu is to understand Hindus He was the incarnation of the national character, a mouthpiece of national feelings The spirit of innovation which is now so active among us, and what professes to reform our society after the pattern of European civilisation will simply shake the principles on which society rests to their very foundation All order of morality will perish with the innocent prejudices with which they have been so long and so intimately associated The system established by the Institutes of Manu can only disappear with the national genius, and history known no calamity more dreadful than the destruction of a nation's genius"

What do we find in the Institutes of Manu upon which Hindu polity is founded, with reference to the union or separation of executive and judicial functions?

"For the king's sake the lord formerly created his own son Punishment, the protector of all creatures, an incarnation of the law formed of Brahman's glory

"Having fully considered the time and the place of the offence, the strength and the knowledge of the offender, let him justly inflict that punishment on men who act unjustly

"Punishment is in reality the king, and the male—that the management of affairs, that the ruler and that is called the surety for the four orders' obedience to the law

"If the king did not, without tiring, inflict punishment on those worthy to be punished, the stronger would roast the weaker like fish on a spit

"Having performed his twilight devotions, let him (the king) well armed, hear, in an inner apartment, the doings of those who make secret reports and his spies

"Let the king who sees through his spies discover the two sorts of thieves who deprive others of their property

"Having detected them by means of trustworthy persons, who disguising themselves, pretend to follow the same occupations, and by means of spies wearing various disguises, he must cause them to be instigated to commit offences and bring them into his power

"Then having caused the crimes which they committed by their several actions to be proclaimed in accordance with the facts, the king shall duly punish them according to their strength and their crimes

"By the means of clever reformed thieves, who associate with such rogues, follow them and know their various machinations, he must detect and destroy them

"Those among them who do not come (to meet the officers of justice), and those who suspect the old (thieves employed by the king), the king shall attack by force and slay together with their friends' blood relations and connections

"A king desirous of investigating law cases must enter his court of justice, preserving a dignified demeanour, together with Brahmans and experienced counsellors

"There let him examine the business of suitors, daily deciding one after another, all cases which fall under the eighteen titles of the law.. ...

"If the king does not personally investigate the suits, then let him appoint a learned Brahmana to try them"

In the above verses we find that, in accordance with Manu, whose Institutes are by Hindus accounted divine, the king, the head of the Executive, was also the head of the Judicial Department He acted when he pleased, as *agent provocateur*, heard his police reports, proceeded to try the cases which his agents had got up, and punished the persons implicated in offences by his spies I express no opinion on the morality of this system, but it is a part of the system on which, according to a learned Hindu Judge of the High Court, Hindu polity is founded, and which is the *dictum* of "the incarnation of the national character, the mouthpiece of national feelings"

When, therefore, any Hindu so-called reformers of the present day talk of the union of judicial and executive functions as a "scandalous system," and an "unholy alliance," they apply such terms to principles of criminal administration, which every Hindu is bound to consider as of divine authority, and which an eminent Hindu tells us form parts of a system which has so long preserved its influence because it is "precisely adapted to the conformation of the Hindu mind and its surroundings"

But it may be said, the principles of Manu are very ancient history indeed, why refer to them with reference to a question under discussion in the year 1900? The answer is "because the ancient principles of Manu are not yet amongst Hindus antiquated; in details they may have changed, especially under alien Governments, but the principles of these ancient Institutes still survive and are acted on by the people in their daily life, and in the determination of their civil rights" As I have shown above, Justice Dwarkinath Mitter eulogises the system of Manu as "the incarnation of the national character" and declares that it "can only disappear with the national genius" And one of those principles laid down by Manu which still actively survives is the union of executive with judicial functions, the centralization of authority in one man as ruler I quote again from a native paper (*Indian Nation*, 14th April 1895) "The people of India by their character, habits and tradition, are not only unfit for, but opposed to, every form of popular government They believe in a monarchy, in an aristocracy, and are instinctively opposed to a democracy Every Hindu family recognises the necessity for a *Kartta*, whose will is law Every zamindar in Bengal combines in his management of his estate executive and judicial functions, he imposes illegal cesses on his raiyats, he collects them, when necessary, by force, he fines, arrests, and imprisons, he decides cases which ought to go before the regularly-constituted courts, he hushes up cases, when necessary for his interest, in short, he, and in every zamindari cutchery, his naib, follows out the ancient principles of Manu, and is prosecutor, policeman and judge in many matters that ought to be decided by judicial officers It is true that the establishment of sub-divisions in districts has curtailed the exercise of the zamindar's authority in this respect, but it still remains in force even in districts which are thought to be civilized, and in more out-of-the-way places it still exists, and is submitted to by the people, as Manu of old prescribed So, to a greater or less extent, in Native States is the Raja still the representative of authority, judicial and executive, to a greater extent where "the spirit of innovation now so active among us" does not prevail, to a lesser extent, where "what professes to reform our society after the pattern of European civilization," has so far succeeded in shaking "the principles on which (Hindu) society rests" But whether in Native States, or in British provinces, the old principle of centralisation of

authority in the rulers, the union of the functions of investigation and of punishment, still remains in the minds of the people "precisely adapted to the conformation of the Hindu mind and its surroundings"

This view we found existing amongst the people when we took the country and the necessity of adapting, as far as possible, our English procedure to the habits, customs and traditions of the people, has been recognized by all our administrators and legislators up to the present time The weighty words of Fitzjames Stephen, whose name, as a great English jurist, commands universal respect are well worthy of consideration "The exercise of criminal jurisdiction is both in theory and in fact the most distinctive and most easily and generally recognized mark of sovereign power All the world over the man who can punish is the ruler Put this prerogative exclusively in the hands of a purely Judicial Officer, who has now other relations at all to the people, and who passes his whole life in a court, and I can well believe that the result would be to break down in their minds the very notion of any personal rule or authority on the part of Magistrates In a few words, the administration of criminal justice is the indispensable condition of all Government, and the means by which it is in the last resort carried on But the District Officers are the local Governors of the country, therefore the District Officers ought to administer criminal justice Also it is necessary that the District Officers should have personal and friendly relations with the people But this, under the circumstances of British India, can be secured only by investing them with miscellaneous executive functions Therefore it is necessary upon the whole that the District Officers should both administer criminal justice, and discharge miscellaneous executive functions

It seems to me that the first principle which must be borne in mind is that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the natives would be dearly purchased even by an improvement in the administration of justice Within their own limits, and as regards the population of their own district, the District Officers are the Government, and they ought, I think, to continue to be so We must have all over the country real and effective Governors, and no application of the principle of the division of labour ought, in my opinion, to be even taken into consideration, which would not leave in the hands of District officers such an amount of power as will lead the people at large to regard them as in a general sense their rulers and governors

These wise and statesmanlike words of an eminent English lawyer and Judge represent the principles on which we have up to date legislated for the people of India How has the system hitherto worked? I quote again from a native paper, which advocates the separation of executive and judicial functions "The Civil Service is undoubtedly a magnificent institution It has given us brilliant administrators It has nurtured scholars and statesmen But it has bred no lawyers Many are the obligations which the country owes to the civilian, for he has not only collected revenues, managed departments, and written reports, but he has changed the face of the country He has extinguished oppression, crushed dacoity, almost banished the many forms of blackmailing with which the country was rife He has aided sanitation, industry and education He has given protection to the weak, restrained abuses of the power of the strong" It would ill become me as an old civilian to say anything more, after such emphatic testimony as to the result of the system under which our administrators have governed India, acting on the principle of Manu, which, according to a Hindu Judge, is "precisely adapted to the conformation of the Hindu mind and its surroundings" and which, on the testimony of an English Judge, "is absolutely essential to the maintenance of British rule in India" If the system which our administrators have followed has accomplished all that the Editor of the *Indian Nation* has acknowledged—a system based on the combination of executive with judicial functions,—I think it may fairly be concluded that the system has been eminently successful and that we can point to it as a proof of our having governed the people to their satisfaction If it were not so, should we have had the gratification of seeing the Native Chiefs of India,—Chiefs too who within even our own memories have fought against us, and not for us—vying with one another in volunteering to help the troops of the British Government in the Tirah Campaign and in China? I trow not If it were not so, if the people at large were not fully conscious that our rule, combining in the representatives of Government executive and judicial functions, had not been exercised honestly and successfully for their benefit, we should not, I think, have seen the spectacles which last weak we have witnessed, of people of many tribes in India—Sikhs, Pathans, Rajputs, Beluchis, Gurkhas, Madrassis—all cheerfully going forth to the farther East to fight the battles of the *Sirkar* Pity that the list of warriors embarking did not include Bengalis, who under British rule have exchanged subjection for a liberty, to which their forefathers for many centuries have been strangers

At whose instance then are we called on to change a system of administration, which is in consonance with the habits of the people, which has been eminently successful in its results, and which on high authority is declared to be "absolutely essential to the maintenance of British rule in India?' On what grounds are we to substitute for it a system which is opposed to the habits of the people, of the success of which, under circumstances similar to those of India, not a scintilla of evidence is forthcoming, which is absolutely opposed to the idea of a paternal Government such as that of India, is, and which must therefore be injurious to the maintenance of British rule in India?

The people at large—the masses—the millions for whose benefit we profess to govern the country, certainly have no desire, and evince no desire, for such a change They have

been accustomed to a paternal Government for centuries, they are entirely of opinion with their legislator of old that "punishment is in reality the king, the manager of affairs, the ruler, the surety for the four orders obedience to the law" And they recognise that such punishment, as the source of administration, should be centred in the *Raja* or *Kartta* "When the Raja smites, to whom lies an appeal?" "At the will of the ruler one must dance amongst the stubble" in these and many other proverbs which are current amongst the masses, where do we find any indication of a wish for the separation of executive from judicial functions in the ruler? In their own families they see the *Kartta* supreme In their zamindaris they see authority in all its phases exercised by one man And in criminal matters the *Kartta* to them is not the Judge sitting in his office far away, and having no relations with them outside his cutchery, but the District Officer who is amongst them, who can listen to their grievances, who can protect them from oppression, and who can punish the evil-doer as swiftly and as effectively in his court under a tree, as at the distant civil station If any one will enquire amongst the people as to the names of men who are held in remembrance amongst them, he will assuredly find that it is the strong and just District Officer whom they revere—he it is who to them is the representative of the Raja, *i e*, the Government

Further, the members of the Muhammadan community, many millions in number, have remainder silent It would be difficult, I admit, for them to recommend the abolition of a system of administration which is entirely opposed to the example and teaching of the prophet of Mecca, and which is followed in every country under Muhammadan rule, up to the present day

Again, as remarked before, the great Native Chiefs are supporters practically in their dominions of the system now assailed, and have shown no desire to have any change in their administration introduced

Again, the members of the educated community in Bengal who press for employment in Government service, seem to have no objection to the existing system, or any wish to have it changed Every year the number of applicants—educated men, graduates—for employment even in subordinate executive posts increases, and I never heard of any one entertaining any scruples as to being nominated for even a Sub-Deputy Collectorship, on the ground of having to combine judicial with executive functions, and so, of having to aid in working a system which "violates the first principles of equity, and is condemned by the voice of public opinion in India

Further, I find no expression of dissatisfaction at the existing system of criminal administration, *qua* the union of executive and judicial functions, proceeding from the Europeans resident in the mufassal, who certainly would make their voices heard, as they have done before now, did they consider their liberties in any way infringed by the existence of a system which does not exist in England

Nor do I find that the parties implicated in criminal cases—persons vitally interested surely in the system of criminal administration—have in any special manner evinced dissatisfaction with the present procedure In the High Court Report of the Administration of Criminal Justice for 1898, I find that the proportion of persons convicted in Magistrates' Courts, who had a right to appeal and exercised that right, was during the last five years, 27 per cent,—that the number of appeals preferred to Courts of Sessions Judges during 1898 showed no signs of increase as compared with previous years and that the decisions of the lower courts were during the last five years, affirmed in the case of about 68 per cent of the persons whose appeals were decided Had there been any real ground for dissatisfaction with the results of trials, there would infallibly have been a much larger proportion of appeals than 27 per cent of the persons convicted, and a much more unfavourable proportion of decisions upheld than 68 per cent

But we are told that the present system of criminal administration "has been and still is condemned, by the general voice of public opinion in India, and that the state of Indian opinion with reference to the question, "is so well known as to require neither proof nor illustration" It is stated that the separation of judicial from executive functions in the Indian administration "is earnestly desired by the Indian community" We are further informed that the matter constitutes an "urgently pressing question," and we have an ex-Chief Justice of the Calcutta High Court describing the existing state of criminal administration,—a system inaugurated and approved by Governors-General, Governors, Lieutenant-Governors, Legislators, administrators, Judicial and Executive Officers of the very highest reputation and ability—as "a disgraceful state of thing"—a "scandalous system," as a "shameful abuse," as giving rise to "grievous injustice"

I have in my remarks shown that neither the masses of the people at large nor the Native Chiefs, nor the educated Bengalis who apply for service under Government, nor the Europeans, nor the Muhammadans, nor the parties to criminal proceedings, are giving at the present any sign of dissatisfaction with existing arrangements, or evincing any desire whatever to treat this matter as a "burning question" With what justice, therefore, can it be said that the "Indian community" earnestly desire to have this matter decided, and that the "Indian community" have so generally condemned the existing system that no proof or illustration of their opinion on the subject is required The papers clearly show that the agitation on the subject is got up by the party whose opinions are, so far as England is concerned, voiced in the paper called "*India*," which, as everybody knows, represents, not by any means the Indian community, but only that portion of the educated in it which supports the views of the Indian Congress Now the Indian Congress has every right to hold its views, and to press its views,

but it has no right whatever to represent those views, as the views of the Indian community, when, as a matter of fact, the vast majority of the Indian community dissent from those views The "advanced Liberal Party" has no right to designate their views as those of the British public The Afrikander Bond has equally no right to describe their opinions as those of the community of the South African colonies And the Congress men, as they are popularly termed, have similarly no right to pose as the Indian community, or even as the educated Indian community They represent themselves, and nothing more

When, therefore, it is asserted that the proposal to change the present system of criminal administration is earnestly desired by the Indian community, or even by the Indian educated community at large, such an assertion is incorrect For the earnest desire to treat this as a burning question, for all the denunciations of the manifold abuses to which the present system gives rise, for all the virulence which is manifested towards Government and Government officers who occupy high executive positions, the exponents of Congress view are responsible and not the Indian community What the views of this "advanced Liberal Party" in India are, is perfectly well known We are familiar with the meetings which are got up, and the diatribes which appear in the native press, but even the native press I read (*Indian Nation*, 11th December 1893) "Whoever is in touch with the people knows how little of public opinion finds expression in a formal way through meetings and newspapers"

The Congress, as we all know, deals with matters of political agitation and social reform The present question comes within the first division of its labours With reference to social reform (as the *Indian Nation* of 24th December 1894 points out) they have signally failed to do anything but speak, and the same paper cannot refrain from saying "when they incur so much sacrifice year after year in travelling long distances and organizing meetings for censuring the Government, the wonder is that it never occurs to them to think of the reforms they can execute with their own hands"

The discussion of the present proposal originated then as part of the political agitation of the Indian Congress—a body of agitators in Bengal representing a certain section of the educated Indians, but having no authority whatever to represent themselves, as, or to speak for, the Indian community as a whole They have every right to hold and express their own views, but they have no right whatever to mistake "the cackle of their burg," for "the murmur of the world," in India or elsewhere

It may have been observed that in my observations as to the classes of the Indian community who desire, or do not desire, any change as to the combination of judicial with executive functions, I have made no allusion to the great landholding class Their attitude on the question deserves more detailed mention The memorial under discussion condemns the existing criminal administration, as being contrary to the first principles of equity, and as involving oppression in its practical operation It is a cardinal principle of judicial procedure that the best evidence procurable is required in support of a charge, and the land-holders of Bengal are certainly about the very last witnesses upon whose testimony reliance can be placed with reference to violation of equitable principles, and oppression on the part of persons other than themselves The old Regulations, to which in the memorial reference is made, contain very stringent prohibitions as to the levy of illegal cesses from their raiyats by zamindars I appeal to the testimony of every District Officer in Bengal, and to the zamindars themselves, as to whether such illegal cesses are not habitually levied in all zamindaries in the province I speak of what I know as regards many estates, and the papers of zamindaries which come under the Court of Wards have furnished valuable information on the subject Upon what principles of equity or obedience to law are such collections of so-called voluntary contributions, on *punya* days, at the *Barwari puja, agamanei khurch, bibaher khurch*, etc, etc, made from the raiyats and levied in default by zamindari peons?

Allution is frequently made to the insufficient pay of the lower grades of police officers as driving them to increase their salaries by other means Is it not the case that in very numerous estates the pay of amins, muharrirs, gomastas, in some cases naibs, is absolutely insufficient to allow of them living honest lives, and that in consequence these zamindari officers fleece the raiyats habitually? Upon what principles of equity are such abuses allowed to continue amongst landholders, without redress?

Charges of corruption are frequently brought against the police I do not say that the police are immaculate, I do not defend them in wrong-doing, but who is it that gives the bribes to the police in important cases, or even in minor cases, when they are interested? Who is it that gives *parbbani* to the amala of Magistrates and Collectors? Who is it that make private disbursements to the Collectorate clerks at the quarter days for payment of revenue? Let the zamindars answer and show on what principles of equity such bribery is justified

In zamindaries cases of all kinds are originated, investigated, tried, decided, and punishment inflicted, by naibs, and criminal cases are hushed up when necessary On what principles of equity do zamindars thus combine executive and judicial functions, not in the interests of public justice, but for their own ends?

The establishment of sub-divisions in Bengal is on comparatively recent origin With the exception of Khulna, Magura, Buxar, and a few others, there were no sub-divisions forty years ago And one of the principal objects of the establishment of such sub-divisions was to enable the executive officers of districts more effectually to grapple with the lawlessness and oppressive action of land-holders This object has to a very considerable extent been attained, but long after the establishment of sub-divisions, the lawlessness and oppressive acts of zamindars

continued, and continue up to the present During four years, in two of the districts of the Presidency Division, I can recall from memory cases of turbulence—disturbance of the peace,—rioting not always unattended with murder,—oppression of raiyats, so that as the raiyats expressed it, their so-called protector "burned their bones"—kidnapping,—harbouring and supporting bad characters, professional forgers, habitual thieves,—illegal distraint,—forcible cutting of crops, etc, etc, all attributable to zamindars such as those of Mokimpur, Narail, Hatberia, Chanchara, Nokashipara, Misridiyara, Kuralgachi, Natuoho, Santipur, Meherpur, and if the records were accessible, I could supplement the list indefinitely. If, moreover, I choose to refer to other districts in which I have served, such as Chittagong, Faridpur, Pabna, Rajshahi, Backergunge, Shahabad, Patna, Arrah, etc, etc, I could tell the same tale but I restrict my references at present to two of the districts of the civilized Presidency Division

If, therefore, the land-holding class appear as supporters of any scheme for weakening the executive, if they profess to be shocked at violations of equity, and flagrant instances of oppression, do they not stand in the position of "the Gracchi complaining of sedition," and of "Satan reproving sin"? Are they the best witnesses against a system which they themselves follow, and against the violations of equity and oppression practised, in which they raise no protest

The class of land-holders in Bengal, I freely admit, have hitherto shown no desire to treat the separation of judicial and executive functions as a burning question It is well known that in many respects the views of the land-holding class have not been in accord with the programme of the "advanced Liberal Party" It is only the other day that I read in a native paper "at the annual meeting of the British Indian Association, Raja Peary Mohan Mukerji out Anglo-Indianed Anglo-Indians in hurling choice epithets at the educated classes To the influence of these mischievous people he said most of the ills, political and social, the country is suffering from, are due, that "men of wealth and station" and the landed gentry of Bengal who "are the real pillars of State" are gradually losing influence with the people, while the "Congress patriots" are gaining popularity with them is felt to be an infliction with the Raja" So recently as last year, when the British Indian Association presented an address to the Governor-General on the occasion of his assuming office, I do not find that amongst the matters of first or ugent importance which the Association pressed on His Excellency's notice was this apparently burning question of the separation of judicial and executive functions They were then specially concerned apparently with the preservation of the "interests of the landed proprietors of this large province", and in dealing with the "legitimate political aspirations of the people" in connection with self-government, they politely hinted that the educated classes had received more consideration in proportion to their importance than the holders of landed property Whereupon the *Indian Messenger*, on 13th January 1899, comments on this hint of the Association "We do not quite understand why there should be an attempt made always by the Land-holders' Association to make a distinction between the educated classes and the zamindars and a difference between their interests There are certainly numerous educated men who own property and there are land-holders who come under the category of the educated classes" If for "educated classes" be substituted Raja Peary Mohan's interpretation of "Congress patriots", the habitual separation of interests between the zamindars and the educated classes, evinced, according to the *Indian Messenger* by the British Indian Association, is easily explained The members of the British Indian Association would resent being excluded from the category of the educated classes, because they are zamindars, but as zamindars they are, as a rule, Conservatives, not like the "Congress patriots," Radicals Hence the distinction and difference between their interests, which is commented on by the *Indian Messenger*

Under what circumstances then has the British Indian Association, which has largely held aloof from Congress agitation, now apparently joined it with reference to this question of separation of judicial and executive functions? What is the ground for the memorial of 30th June addressed to the Government of India? For what reason do the members now, through their Secretary, say that this question, to which hitherto the Association has apparently been largely indifferent, is one "the urgency of which has been repeatedly admitted by the highest authorities in this country as well as in England for upwards of a century?" What proof do they give of the "flagrant abuses" in the practical operation of the system, which they now join with the "Congress patriots" in denouncing?

I am well aware that even amongst the land-holders of Bengal there are some who hold "advanced" views, and there are more who cannot afford to ignore the vote of the Congress party, or to irritate the press which is largely in the hands of the Congress patriots But why this alliance with the "patriots," and why this allowing of Association to repeat the statements of the Congress men without boldly and independently framing a memorial based on their own experience and their own investigations? One of the leaders of the Congress party, the Editor of the *Bengalee*, terms the memorial of the British Indian Association a "masterly" document; it may be so· upon that point I express no opinion, but it ill befits the Editor of the *Bengalee* to speak of it in this strain, when it is nothing but a bare-faced plagiarism of the memorial of the Congress party, and when it has been submitted in accordance apparently with the agitation got up by the Secretary of the Indian Association who is identical with the Editor of the *Bengalee* and the leader of the Congress party referred to I read in the *Mihir-o-Sudhakar*, a Muhammadan native paper of Friday last (the 22nd *Ashar*—6th July), that the Indian Association "is circulating broadcast and *gratis* under the title of "The evils of the union in the hands of one man, of judicial and executive functions," a set of tracts,

accompanied by a sketch or form (*pandulipi*) of how the Lieutenant-Governor of Bengal and the Viceroy should be addressed on the subject Now the Editor of the *Bengalee*, in his capacity as Secretary of the Indian Association, is at liberty to agitate on the question if he is advised so to do But when the recipients of his tracts follow his advice, adopt his form, or, as in the case of the British Indian Association, boldly plagiarise, and adopt as their own apparently independent expression of opinion, another memorial with which the Secretary of the Indian Association must be perfectly acquainted, it is hardly consistent with modesty, or indeed common honesty, for the Secretary to describe this plagiarism as apparently a separate document, and dignify it with the term "masterly" "The *gwala* does not call his own milk sour," says the Bengali proverb but there is no proverb as to the action of the *gwala* when he calls milk provided by another man excellent, while not calling attention to the fact that such milk is really his own, or prepared according to his own direction

I have called the memorial of the British Indian Association a plagiarism of the memorial of July 1899, submitted to the Secretary of State, and embodying the views of the Congress party I shall not waste time in showing this in detail, a reference to both documents will amply establish the fact of the wholesale plagiarism of one document from the other The names of the distinguished officials, etc, whom the Secretary of the British Indian Association cites, are the names of the signatories to the memorial of 1899 The sequence of the historical arguments in both documents is the same The authorities are the same—the text, although judiciously paraphrased, is the same The recommendations are the same—the allusions to violations of equity and oppression (of which for obvious reasons, no instances are given in the later document) are the same, in short, there cannot be the slightest doubt that the two documents are practically the same, and the second a wholesale plagiarism of the first The British Association have a perfect right, if they please, to adopt the memorial of the Congress men as their own, but surely if they do so, they are bound to say so, and not to palm off a plagiarised edition of the Congress memorial as a separate and independent document representing the views of the landholders of Bengal

Let me, however, be strictly accurate The second edition of the memorial differs from the first in three points In the first edition the memorialists, while quoting at considerable length the views of Sir F J Halliday in 1838, pass over, with a brief remark in a single sentence, the very significant fact that eighteen years afterwards, when he had gained fuller and larger experience, Sir F Halliday most emphatically retracted and condemned the views to which he had given earlier expression In the second edition of the memorial the British Indian Association, while quoting the earlier views of Sir F Halliday, suppress all mention of the retraction Such a *suppressio veri* cannot be accounted accidental, seeing that the writer of the second edition had the document of 1899 before him when he wrote the memorial of 1900

Secondly, the first edition, between the authorities quoted for the years 1854 and 1857, there is a reference to the despatch of the Court of Directors of 1856 But in the second edition all reference to this despatch is omitted Now a despatch of the Court of Directors, if favourable to the views of the memorialists, whether of 1899 or 1900, was a document of the highest importance -why should it be omitted by the memorialists of 1900? As a matter of fact, this despatch of the Court of Directors was in reality *not* favourable to the case of the memorialists at all A passage in the despatch, which upsets the case of the memorialists altogether was quietly omitted—in plain English, the despatch was garbled Under what circumstances the signatories of the memorial of 1899 containing amongst others Judicial Officers of high standing, considered it just and equitable to use a garbled quotation in support of their contentions, is for them to explain The fact, however, remains that the despatch was garbled in the first edition of the memorial, and another significant fact is that this garbling of the Court of Directors' despatch was detected and commented on by the Government of India in their letter of 31st March 1900 The only quotation referred to in that letter was that regarding this despatch When, therefore, the writer of the second edition of 30th June 1900, awoke to the fact that the unfair rendering of the despatch of 1856 had already excited the attention of the Government of India, he not unnaturally thought it prudent in the second edition of the memorial to suppress all mention of such an unfortunate quotation as had been made in the first edition

Thirdly, in the first edition of the memorial the signatories thereto adopted the view that the changes which they advocated could be carried out without expense But the British Indian Association in the second edition did not take this view They wrote of the expense of the contemplated changes as "a serious difficulty" and devoutly hope that it might not be prohibitive In the memorial for the adoption of English gentlemen of high judicial experience, but with not much knowledge of administrative questions, it was easy for the Congress party to minimise the question of expense, but the British Indian Association knew more about the matter They foresaw that the changes could not be made without large expense, they were quick to realise that additional expense meant additional taxation, they were shrewd enough to see that in such additional taxation the zamindars would not escape, and therefore they said "Give us these changes, they will cost money but throw no additional burden on us take the cost from the surplus in Judicial Department" Here they followed the lead of the Indian Association, whose members were just as anxious to escape the burden of additional taxation as the land-holders

I have dealt thus at length with the question of the attitude of the land-holders to emphasize the fact that their adhesion to the memorial of 1899 is simply the result of an agitation

got up by the agitators and Congress patriots to which the zamindars, or those amongst them who favour, or wish to conciliate the advance party, have succumbed Their action in plagiarising bodily the memorial of 1899 deprives their memorial of 1900 of all weight as an independent expression of the opinion of the landed proprietors, and stamps their advocacy of Congress proposals, as a surrender to views which I cannot believe to be those of the zamindars of Bengal as a body If these views do represent their opinions, then all that I can say is that their desire to have the executive weakened is intelligible, but that as supporters of oppression and violations of equity in their own actions, their testimony is of little value

Before going further I wish to look a little ahead, and consider to what the proposal embodied in the memorial of 1899, if adopted, will, in accordance with the aims of the Congress party, undoubtedly land At present it is proposed to have as it were two parallel lines of administration—the judicial and the executive, the officers in one consisting of members of the Civil Service, and of half of those members of the Uncovenanted Service, who at present perform the duties of Deputy Magistrates, and Deputy Collectors, while the executive line will include the remaining member of the Civil and Uncovenanted Service All the officers of both Judicial and Executive Departments are appointed by the Local Government, with the exception of the Judges of the High Court, who, nominated by the Government of India, are appointed by the Queen I notice, however, that the nomination of Civilian High Court Judges by the Government is objected to, and a hint is thrown out that in future such Judges should properly be nominated by the High Court itself I cannot say whether this suggestion is made in accordance with any practice which obtains in England, but I am not aware that any one of Her Majesty's Judges at home is nominated by other Judges I rather think that this is not the case, but I write subject to correction if I am wrong

I find, moreover, in the memorial that "no Judicial Officer can efficiently perform his work otherwise than by close adherence to the methods and rules, which the long experience of English lawyers has dictated" and that "it is essential to the proper and sufficient, and we might add impartial, administration of justice that the Judicial Officer should be an expert specially educated and trained to the work of the Court" It is not difficult to interpret this principle as meaning, in the opinion of the memorialists and the Congressmen, whose views they represent, that every Judicial Officer ought to be a member of the legal profession And in one of the native newspapers, which favours the views of the "advanced Liberal Party" in India, we find this clearly stated in so many words In the issue of the *Indian Nation* of 27th January 1896, in an article treating of the very proposal now under discussion, we find the following remarks After declaring that the proposals of Mr Manomohan Ghose and his supporters in India are only "halting half-hearted half-measures" that he had already examined Mr R C Dutt's scheme and "found it wanting" the editor goes on "For ourselves, we would not care to mince matters" The wrong is much too serious The whole system, let us say, is rotten We have no other word to describe a state of things in which law is administered by amateurs who again are held together by an *esprit de corps*, who are worshippers of prestige, and whose prospects in life depend on the good graces of the head of the Executive Government We take it, therefore, that there are three essential conditions of reform, *first*, that the judiciary should not consist of members of the Civil Service, but of members of the legal profession, *secondly*, that they should be subordinate to the High Court, and not to the Executive, *thirdly*, that they should not themselves discharge any executive functions It is of course desirable that Magistrates of the second and third classes should in respect of judicial matters, be subject to the District Judge rather than to the District Magistrate But that would be only to scotch the snake and not to kill it The District Judge himself cannot always afford to be independent He is certainly ill-trained as a lawyer, and he is affected by the *esprit de corps* of the service The Judicial Department in fact must be rigidly marked off from the Executive, each must have its own hierarchy, its own rules, traditions, principles, and if necessary its own special *esprit de corps* There must on no account be any interlacing or communion The executive spirit is distinct from judicial
But we hope that the gentlemen who lead agitation will rise to the occasion and give us a scheme that will not be tinkering but thorough, that will not be a compromise with evil, but a clear instalment of the good, that will not be merely lawyerlike but statesmanlike"

"*Fas est ab hoste doceri*," and it is well to known what one representative of the "advanced Liberal Party" thinks of the scheme of "the gentlemen who lead agitation," *i e*, the Congress men who pose as voicing the earnest desire of the Indian community, and what he thinks of the scheme put forward by them If this scheme can be described by one apparently in the most advanced section of the "advanced Liberal Party" as not statesmanlike but mere lawyerlike tinkering, it can hardly be likely to commend itself to the "brilliant administrators" and "statesmen" whom on the testimony of the above editor the Civil Service has brought forth, and if this still further progressive scheme of the *Indian Nation* is to be the substitute for, and the outcome of, the "halting half-hearted half-measures" of the Congress, there can be little doubt as to the verdict which will be given by every man of ordinary common sense and interested in the welfare of India So far as I can judge, these views of the *Indian Nation* do find favour with many of the Congress party, and they do form logically the outcome of the present proposal of the "gentlemen who lead agitation"

Where, then, are these members of the legal profession to come from who are to form the judicial administration? They cannot come from the Civil Service, who are especially excluded, and such exclusion holds good as to the members of the Uncovenanted Service They cannot come from the European gentlemen of the Indian Bar, for obviously the members of that class

would be inadequate to fill the ranks of Judicial Officers Clearly then, they must be found in the ranks of native members of the legal profession—native barristers and vakils

The present scheme, apparently moderate in its pretensions, aims at, and will infallibly end in, the whole Judicial Service being composed of Bengali members of the legal profession, under a High Court which will be partly composed of a few Barrister Judges from England, and of native judges appointed from the ranks of Bengali Judges in the mufassal This is no mere conjecture, it is clearly foreshadowed in the proposals of the *Indian Nation* and it is the legitimate outcome of Congress agitation I do not blame the Congress for agitating in this direction They are perfectly right in trying to get, like the Afrikander Bond, all that they can get for members of their own nationality and adherents of their views But it does not follow that it is wise or prudent, or equitable, for the British Government to adopt the proposals of a small party in Bengal who in no sense represent the views of the Indian people, or of a majority even of the educated community, who agitate for their own aggrandizement, and who, to quote from another native paper (*Unity and the Minister*) "have the notoriety of indulging in tall talks and doing nothing" "forming a sad contrast to the people of other provinces who are more sincere and more practical"

The experiment of entrusting the "gentlemen who lead agitation" with executive functions, has been tried during the last fifteen years in districts in the mufassal Municipal Government has been made over to the natives of the country, in almost all cases those of the vakil or lawyer class have pressed forward to take up the position of Chairman or Commissioners of the Municipalities With what result? I can testify that the people simply groan under the system and cry out for a return of the old days when they had *justice* given to them by such-and-such a Magistrate-Sahib, and such-and-such a Deputy Magistrate Many a time have I heard them say of municipal administration at present *je rakhyak shei bhakhyak* "They who should protect, devour us," and the complaint is true The experiment not merely in one municipality but all over the country has been a mischievous fiasco, a very significant, and to the people of the country, painful illustration on their own proverb *anek shanyan gajan noshta* "When you have too many religious mendicants the *Charak puja* (or swinging festival) is spoiled, or as we know it in our tongue, "Too many cooks spoil the broth" But lest my opinion may be considered as that of a *laudator temporis acti*, let me quote again from another native paper (*Rees and Rayyet* in 1892) In an article headed "The truth about Self-Government," which is signed "Truth" but appears in editorial type I find the following remarks "Since the introduction of the present system things have, in many municipalities, gone from bad to worse, so much so that the municipal administration has become a burning scandal, and sensible people of all classes speak in unmistakable terms against it . . The causes of municipal failure are not far to seek They lie on the surface They are congenital Nor is there occasion for surprise What ground had any body to expect success? Is it possible for men who have never controlled half-a-dozen servants in their life to any purpose, to control properly a multitude of subordinates of different castes and grades? . . . A person who is quite incapable of putting his own house in order, is entrusted with the duty of looking after the health and life of a city and improving its sanitary condition Nothing madder than this is possible to conceive There are again many subordinates who are one way or the other connected with the Chairman, the Vice-Chairman, or this Commissioner or that, and the executive cannot keep a tight hand over them, either for personal reasons or for fear of some Commissioner . . . Municipal Commission is fast becoming a lucrative and charming profession, and Municipalities have become paying concerns The head executive offices are the prize appointments in the Department, and are therefore greatly coveted by all, and especially by that profession which is most well-paid and covetous Pleaders, particularly the prosperous among them, have very little time to devote to anything except their own professions but this notorious fact never deters them from canvassing for the Chairman and Vice-Chairmanships of Municipalities and District Boards, and the number of these aspirants is yearly increasing"

To the truth of this description of the correspondence of *Rees and Rayyet*, I most unhesitatingly subscribe.

I am not writing from hearsay I speak of what I know, *quaeque ipse teterrimavidi* For the last five years I have been a resident within the municipality of Ranaghat, which is, on the rail, within a couple of hours' run from Calcutta, and within that time I have witnessed on the part of the municipal authorities, with a vakil as Chairman, and local zamindars or their adherents Commissioners, as much nepotism, as much oppression of the poor, as much perverse mal-administration, as much moral weakness, and as much servility as I think I ever heard of on the part of any sort of native functionaries during my quarter of a century's service as a Government officer Over and over again I have been appealed to by the poor to save them from oppression Over and over again they told me "When Babu Ram Sunker Sen and Babu Ram Churn Bose (two Deputy Magistrates of the old school, whose names are still held in reverence by the people) were here, we got justice—now no one listens to us, it is a country of the Mughs" And when I have represented the state of matters to Government, I have been told that similar complaints are universal

But what has this failure of the vakils class to properly perform executive functions to do with the present question? A great deal in truth The executive failure of natives of this country, when relieved of effective supervision, is notorious, and this extends to higher functions than municipal duties "We must confess,"

says the *Indian Nation* sorrowfully "we cannot think of any member of the Provincial Services, who may be regarded as qualified to adequately discharge the functions of an Under-Secretary" By his nature and constitution, the Bengali does not take kindly to executive work, which involves great physical exertion and endurance of personal hardship He is not fitted to be a ruler and leader of men, he commands no respect amongst the manly and warlike tribes of India—a fact which is very significantly recognised both by Government and Bengalis themselves How many Bengali civilians volunteer for service in the Upper Provinces and how many officers of that nationality does Government ever dream of sending to the Punjab? An Englishman can serve anywhere in India, and the manly races respect him, but a Bengali Hakim runs too much risk of being sent "with shivered *fasces* home" to tempt him to choose a career amongst the manly races of Northern or Western India He, therefore, much prefers the pacific population of lower Bengal and amongst them even he prefers the pacific work of the judicial line, where he has nothing to do with "the reform of a people or the pacification of a district," where his work is sedentary and involves no personal risk It is not, therefore, surprising that the capture of the judicial administration should commend itself to the Congressmen when the control of the executive is beyond their grasp and is unsuited to the temperament of their Bengali fellow-countrymen

But the failure of the Chairman and Vice-Chairman of municipalities, taken from members of the legal class, as described in the extract from a native paper which I have given above, is not attributed merely to physical indolence but to want of moral backbone The writer of that article charges them with gross nepotism, with moral weakness, with corruption, and these charges, be it remarked, are made by a Bengali, who writes "I am not deficient in patriotism I may add that I have had the experience of both the posts, and have some real sympathy with the local self-government scheme, if it be warily introduced, and if our application for its general extension is based on the maxim of 'first deserve and then desire'

In the papers which accompany the memorial, I find that native executive officers, who certainly belong to the same class as those of the legal profession, are freely charged with "subserviency" to their superiors This is not very complimentary to the class but it apparently has been left to a writer in the *Indian Nation*, the newspaper which, as above shown, advocates even more "advanced" views than the memorialists, to extend this odious charge to all classes of his countrymen, in terms which if used by an Englishman would certainly have been vigorously resented as a slander on the nation "In truth" writes the Editor of the *Indian Nation*, on 24th December 1894, in commenting on an extract from the *Madras Times*, on "Bengali Public spirit," "there is hardly a more servile person in creation than the Bengali His political condition has been the effect, and to a much larger extent the cause, of his debased character The theoretic truths of his religion cannot prevail against the ceaseless operation of the manifold influences of everyday *life* If expectation of offices or even of empty honour makes him a sycophant, he has some excuse But purposeless servility, servility for its own sake is that which stamps him as phenomenally mean He will do worship at the shrine of a *sahib*, because he is a *sahib*, of and any rich man because he is a rich man If those who are or expect to be, servants of Government were alone the weak-kneed members of society there would not be much cause of complaint But the most abject submissiveness or the most aggressive sycophancy is by no means uncommon amongst the wealthy and the exalted, it is these who are the real disgrace of the country They lack not only a sense of duty to the country but also personal self-respect" (I confess that when I read these remarks, I thought that they were not those of the Editor but of the paper which he was quoting But there they stand in editorial type, distinct from the type in which the remarks quoted from the madras paper appear)

If this description of Bengalis by a Bengali, an advocate of the most advanced views of the "advanced Liberal Party," be true, with what confidence can Government be called on by that party to entrust the judicial administration to such hands? If this be true, on what grounds can the memorialists, who include ex-Chief Justices of the High Court, recommend that the practically uncontrolled administration of justice should be made over to men of any class so wanting in moral qualities as described by the *Indian Nation*? If this be true, what benefit will be conferred on the people at large? Verily they will say with justice "*Bore Shâp*" In the gift there is a curse

But it may be said the nepotism, moral weakness, corruption, servility which are charged against Bengalis in the columns of *Rees and Rayyet* and the *Indian Nation* have only been manifested in the performance of executive functions As Judicial Officers they will be removed from the corrupting influence of executive duties, and they will have no tyrants like District Magistrates to whom they can be subservient—"*Credat Judaeus Apella*"! If there is one sort of tyranny which a Bengali cannot resist it is the tyranny of his relations, friends and admirers Put a Bengali into any office where he has patronage, and the solicitations of relations and friends for a share, he cannot resist Posts of ministerial officers, even down to peons and chaprasis go according to the importunities of relatives, and the pressure of not always disinterested influence, and public responsibilities have no chance when pitted against the claims of scores of poor relations, which swarm round every Bengali of respectability or position There are other forms of subserviency than to the District Magistrate Subserviency to race-feeling, subserviency (as the *Indian Nation* points out) to the rich, subserviency to the native press, and such malign influences, which, *teste* the native papers, their countrymen have failed to resist when performing executive functions, are just as potent for evil, even more so I should say, in the judicial administration

If then the transfer of the judicial administration to Bengali hands be the ultimate aim of "the gentlemen who lead agitation"—and I solemnly warn Government that this in fact is what is aimed at covertly in the present scheme, openly (as I have shown) by the adherents of the *Indian Nation*,—then I can only say that the adoption of any scheme which would further such an aim, would be disastrous to the reputation of the British Government, and fatal to the best interests of the people Bengalis are no more fitted to control the judicial than the executive administration of the country The administration of justice under native control, whether by members of the legal profession or otherwise, would simply very soon become a scandal, and the terms of reprobation in which an ex-Chief Justice has allowed himself to describe the existing state of matters would be eminently applicable to the new system introduced in the Judicial Department When, moreover, as certainly would be the case, the influence of a department so administered would frequently be employed to weaken and cripple the executive, the result would without doubt lead to a diminution of influence and authority of the representatives of Government, the maintenance of whose position, as Sir Fitzjames Stephen pointed out, "is absolutely essential to the maintenance of British rule in India"

It is suggested that the experiment of separating executive from judicial functions might at all events be tried in some of the more advanced districts as they are styled It is indicated by Lord Hobhouse that the general assumption in his time was that the separation system was good "except for very backward and primitive parts of India" It is stated by ex-Justice Sir W Markby "If there is any reason to suppose that the system might be ineffectual for the repression of crime it might be tried as an experiment in one of the districts adjoining Calcutta It seems hardly likely that a system which succeeds perfectly well in that city would be a failure if tried in the immediate neighbourhood And another ex-Justice, Mr C D Field, writes thus "In Lower Bengal such an officer (as Sir Charles Elliot describes) most effectively administers the Sonthal Parganas, the Chittagong Hill Tracts, and the Hill Tribes of Orissa, but in the Presidency Division he is as great an anachronism as to the modern traveller is the palanquin in which the subaltern travelled up the Grand Trunk Road to join his regiment in the early days of the century" The British Indian Association, too, says "whatever might have been the advantages of the present system in the early days of the British rule, when the administration was necessarily moulded on the Oriental model, it has become utterly unsuitable to the altered conditions of the present times" All these statements are based on the fact that education and civilisation on Western principles has not stood still I grant this freely, and I think the inference may be fairly drawn that where there has been more of education, there one ought to find more respect for the law, less lawbreaking, less necessity for a strong executive, less need for the Eastern, more room for the Western, methods of administration of criminal law Mr Justice Field refers to the Presidency Division Sir W Markby speaks of a district "in the immediate neighbourhood of Calcutta" as the sphere in which such evidences of progress may be expected, and I may fairly, therefore, take the Presidency Division to test the accuracy of the *dicta* of these gentlemen I am not aware whether Sir W Markby ever spent any time in any district of the Division beyond Calcutta itself, and I cannot quite remember whether Mr Justice Field served in any part of it, except (if my recollection serves me rightly) as Sub-divisional Officer in his early days at Chuadanga and as Judge of the Small Cause Court for a time in Jessore But neither Sir W Markby nor Mr Field knew the people of the division, and neither of them had any relation whatever with them beyond the doors of the cutcherry,—and Mr Romesh Chandra Dutt, the author of the separation scheme under discussion, in his Ancient India, Volume II, Chapter III, warns us against writers and administrators who have made the mistake of judging the people of India "by the chicanery and falsehood witnessed in law courts Without ostentation I may claim to know the Presidency Division well Three of its districts I know intimately, I may even say I know the majority of the villages I have been Commissioner of Revenue and Inspector-General of Police of the whole Division I have also served as Judge for a short time in one of the districts and for several years latterly I have lived in the district of Nadia in even closer relations with the people than before I freely admit that in their division the influence of education has been in many places apparent, in so far as the multiplication of schools, the acquisition of the English language, and the partial adoption of English manners, has been concerned The Presidency Division has been a stronghold of the Congress, and the development of the people in accordance with its supposed aim of elevating the masses might in consequence have been expected Amongst the educated landlords we surely might expect to see resort to Western principles of managing their estates, and the disappearance of the Oriental system of lawless highhandedness in their relations to their neighbours and their raiyats In these civilised districts we might confidently predict diminution of crime and increase of assistance given by the land-holder class in aiding the authorities to keep the peace What then are the facts?

In 1882, when the agitation for the "priceless boon" of local self-government was beginning, and when it was claimed almost as a right of the civilized districts of the Presidency Division, according to the High Court Report of Criminal Administration for that year, there was a total of 185,266 criminal *cases of all sorts* found to be true This total represents the figures for the 44 districts of Bengal Of this number, 32,428, or about 17 per cent., were contributed by the five civilized districts of the Presidency Division, and the greatest number of criminal cases in the province of Bengal, *viz*, 14,207, came from the district "in the immediate neighbourhood of Calcutta," *viz.*, that of the 24-Parganas The total number of

true *cases under the Penal Code* in the province was 133,628, and of this total, 23,351, or 17 per cent, were contributed by the five districts of the Presidency Division, and again in that division, the district of the 24-Parganas heads the list of all districts in the Lower Provinces with 9,065 cases under the Penal Code There are many districts more populous, and more extensive in area, than the so-called civilized district of the 24-Parganas "in the immediate neighbourhood of Calcutta," but the nearest approach to it in number of criminal cases under the Criminal Code was 6,716 in the "uncivilized" district of Tippera Of the 23,351 cases contributed by the whole Division, the 24-Parganas returns 38 per cent

It seems clear, therefore, beyond all doubt that in 1882, the Presidency Division, with its five civilised districts, had a very bad record with reference to criminality, and that the prevalence of education in the 24-Parganas, the "district in the immediate neighbourhood of Calcutta," did not save it from the bad pre-eminence of having by a long way the largest number of offences against the criminal law of all the districts in the Lower Provinces of Bengal

I return now to the High Court Report for 1898, sixteen years after 1882, during which time no doubt education still further extended, and the elevating influence of the Congressmen and of the members of the legal profession, who were developing the boon of self-government in municipalities, had ample time to make itself felt The number of all criminal cases in Bengal in 1898 was 230,521, and of this number, 43,975, or 19 per cent came from the civilized districts of the Presidency Division Again, the 24-Parganas, with 24,615 cases, far outnumbered any district in Bengal Of 144,087 cases under the Penal Code in the 44 districts of the province, 21,252, or nearly 15 per cent were reported from the Presidency Division, and again the district "in the immediate neighbourhood of Calcutta" headed the provincial list of districts in respect of criminality under the Code with 8,249 cases, or 38 per cent of the crime of the Division

The cases of offences *affecting the public tranquillity* are those in which, as is well known, the land-owning classes principally figure What are the figures as regards these in the enlightened districts of the Presidency Division? In 1882 there were in the 44 districts of the province 2,258 offences against the public tranquillity, and of this total, 401, or 17 per cent, came from the five Presidency districts In 1898 the number of such cases rose to 3,490, and of this, 539, or above 15 per cent came from the Presidency, showing a rise in number and a diminution of about 2 per cent on the provincial average In this year there were only ten districts out of the 44, which showed more than 100 cases in each, and three of these ten leaders in turbulence were in the Presidency Division

Bihar is always looked upon as more unenlightened as regards education than the advanced districts of Bengal Its population, more manly and warlike than Bengalis—comprises, in the Doms, Dosadhs, Ahirs, etc, several classes with distinct proclivities towards crime Let us compare for a moment the *cost of the criminal administration* of an unenlightened Bihar Division, that of Patna, with that of the civilised Presidency Division in Bengal The population of the Presidency Division in 1882 was above 7¾ millions, that of the Patna Division in the same year a little above 15 millions The charges of all the Criminal Courts in the Presidency Division for 1882 were almost Rs 3,62,000 Of this total, the share of the 24-Parganas was nearly Rs 1,32,000 The charges of all the courts in the Patna Division, with double the population of the Presidency Division, were Rs 3,95,000 In 1898, after sixteen years of progress and enlightenment, the population of the Presidency Division rose to nearly 8 millions—an increase of a quarter million as compared with 1882 The cost of the Criminal Courts rose to nearly 4½ lakhs of rupees Of this total the district of the 24-Parganas required nearly 2 lakhs In 1898, the population of the Patna Division increased by upwards of 8,00,000 and the cost of the Criminal Courts increased hy a lakh of rupees The cost, then, of the courts of the enlightened Presidency Division in 1898 was above 4 lakhs for a population of nearly 8 millions That of the so-called backward division of Patna was nearly 5 lakhs for a population of almost 16 millions The most costly district as regards criminal administration of all the districts in the whole of the provinces of Bengal in 1882, was the District of the 24-Parganas, and the same fact is again evident in 1898 In 1882, no district in Bengal cost a lakh of rupees for the charges of its Criminal Courts except the 24-parganas, with its expenditure of nearly Rs 1,32,000 In 1898, no district approached an expenditure of 2 lakhs of rupees for its Criminal Courts, except the 24-Parganas, with its charges of nearly Rs 1,94,000

What then becomes of the contention that the districts of the Presidency Division are so civilized, so law abiding, so permeated with Western ideas, as to justify any weakening of the executive in them? What has been the patent result, as regards criminality, of these districts? The figures show beyond all civil that these so-called enlightened districts furnish nearly one-sixth of the criminal cases in Bengal, and that as in 1882, so in 1898, the district of the 24-Parganas, after sixteen years of education and a long term of Congress elevating influence, still returns far and away the largest number of criminal cases in Bengal Why should the experiment of weakening the executive in criminal matters be tried, as suggested by Sir W Markby, in such a criminal district which has resisted the supposed influence for good of "the gentlemen who lead agitation," and which still heads the list of districts as regards crime in the Province? And where is the anachronism, as discovered by Mr Field, of having a strong executive after the Oriental system in the Presidency Division, when its districts have not yet learned the elementary principles of law-abiding as enforced by Western civilization? And what right have the

zamindars represented by the memorial of the British Indian Association to talk of progress and the unsuitableness of the existing criminal administration to their enlightened condition, when the criminal records show that the land-holders of the so-called civilized districts of the Presidency Division are as turbulent now as they were in 1882, and as persistent law-breakers in connection with offences against the public tranquillity as are the inhabitants of districts which it is the fashion to call uncivilized? The land-holders of the Presidency may be more *scientific* law-breakers than those of some other districts, but they are law-breakers all the same, and their affectation of having advanced beyond the Oriental principles of criminal administration is unwarranted by facts as disclosed in the judicial records of the province

I hardly think that I need take up the time of Government in giving any detailed answer to the various objections brought forward by the advocates of the separation system, with reference to the existing methods of criminal administration These objections are not new, they have been answered repeatedly by able administrators and doubtless Government will now receive still further replies from abler hands than mine That the present system is not in accordance with the first principles of equity is one of those abstract principles which I need not discuss That the Judicial Officer should have an unbiassed mind with reference to any case which he has to try is another principle which is insisted on, but it does not seem to have occurred to the memorialists that this principle is, as regards the facts of criminal administration, departed from in almost every case, the trial of which *by jury* lasts over a day Every Congressman loudly agitates for the retention and extension of the jury system, although he must be perfectly well aware that in every case the jurymen, if detained for more than a day, leave the court, go to their homes or lodgings, and freely discuss the case on which they have to give their verdict An unbiassed mind is quite as much required in the case of an ordinary juryman as in the case of a District Officer, but I have never heard any outcry from the "gentlemen who lead agitation," with reference to the jurymen, who notoriously act as I have described, and I never heard it suggested that the system which prevails in England of locking up the jurymen till their verdict is given should be followed in India Why is this? Because the advocates of the reform of our present system, and the members of the legal profession in the mufassal, entertain no serious objection to the minds of jurymen being biassed by discussion of pending cases when such discussion may be favourable to their clients Similarly, the Judge who causes a man to be committed for perjury before himself tries him at the Sessions, although he is perfectly well aware of the facts on which the commitment is made But, say the objectors, such cases are not of frequent occurrence Quite so, and the same remark is applicable to the cases which District Magistrates try themselves, the proportion in Bengal being less than one per cent

As for the charge of subserviency to District Magistrates, I do not say that instances of such may not occur, but I most unhesitatingly state, for the honour of district Magistrates and for the credit of native Magistrates, that such instances are so rare as to be unworthy of notice I have served with many native Magistrates, and I very strongly assert that the odious charge brought against them by the memorialists is without foundation As for the still more astounding charge of Government trying to influence improperly the judicial authorities, I leave that to higher authorities to deal with We have the testimony of Sir Richard Couch, ex-Chief Justice, that, according to his recollection the "Executive were in the habit of loyally accepting the decisions of Judicial tribunals" Sir Richard Couch retired in 1875, Sir J B Phear, another of the memorialists, in 1876, Sir W Markby, in 1878 It is therefore evident that they have no personal knowledge of what happened after those dates The same remark applies to the experience of Sir R Garth who retired in 1886, and I think that some very much stronger evidence than the statement of the late Mr Monomohun Ghose is required before such a serious, and, so far as I know, unfounded charge is brought against the highest officers of Government

These and similar objections have been repeatedly raised, have been exhaustively discussed, and yet after a full consideration of their merits, the maintenance of the existing system has been definitely supported by an array of executive and judicial authorities, which can leave no doubt as to the side on which the preponderance of evidence is to be found The weighty opinion expressed by Mr Fitzjames Stephen in 1872 was supported by all the Local Governments of India, and by many judicial officers of the highest standing In 1883 the question again came up, and again the balance of evidence was in favour of the retention of the existing system, the High Courts of Madras and the North-Western Provinces being amongst those who very definitely supported the existing system

I do not mean to say that the existing system is perfect I am well aware that it is not in force in England, but it is to be remembered that it took centuries to introduce in England the separation of executive and judicial functions, and that it cannot be brought into force in a country like India, until the people have gone through something of the political chastening and suffering which have made the establishment of the system possible in England, and the absence of which has similarly retarded its introduction amongst many Continental nations "In England," said Sir Bartle Frere in 1860, "police reforms were commenced in the time of Henry III, and the subject was very vigorously taken up in the time of Elizabeth, but little effectual was done until the time of Sir Robert Peel It took a very long time to carry out the principle of a police force separate from, and independent of, the judicial magistracy in the metropolis, and now though more than thirty years have passed since the principle was recognised by all the great authorities in England, it has not yet been fully extended throughout the United Kingdom" But every

year, according to Sir Bartle Frere, progress had been made, and he hoped that at no distant period the principle would be acted on completely throughout India Our administrators have not called in question the soundness of the principle of the separation of executive and judicial functions during the past century they have made very decided progress in legislating with this end in view, but seeing that it took six centuries to attain this object in England, it is not to be wondered at that in 1883, say somewhat more than a century after we took India, they were of opinion that the time for complete separation of the two functions had not arrived, and that it was still absolutely necessary for the maintenance of British rule to retain in the hands of District Officers the power of judicial punishment as well as of executive control "The measure of the growth of any civilized community," said His Excellency the present Governor-General, last year, "is its capacity to assume within safe and well ascertained limits the responsibility for its own regulation, and in India as elsewhere there is required for this problem of political and social evolution not merely the good-will of the deponents of power, but the aptitude of the depositories for the exercise of the functions that may be committed to their care" So far as regards the present question, the safe and well-ascertained limits within which the responsibility of exercising the functions of a judicial administration entirely separated from executive control have, in my humble opinion, not yet been reached in Bengal

That the system up to 1883 had worked well, there can be no doubt whatever It has become customary in certain quarters to talk of the stain which has been cast upon British Administrators by the union of judicial and executive functions, but this is mere empty rhetoric, suitable perhaps for purposes of political agitation, but absolutely unfounded on fact For, say the agitators what they may, the Englishman, as District Officer, up to 1883, was looked up to by all the people as a just man, stern and strict, and high-handed even, but still a man who honestly tried to do his duty to the people entrusted to his charge That he succeeded in maintaining the character for justice of the British administration is testified to in the extract which I have given in a previous part of this paper That he made mistakes —that indiscreet men occasionally erred and committed censurable acts—who will deny ? But that indiscretion was the badge of all the tribe of Executive Officers, and never to be witnessed amongst judges even of high standing, who will assert ? That the system is to be blamed for individual acts of indiscretion is a fallacy, and this system it is of union of judicial with executive functions in District Officers, which has made the British Government in India what it was up to 1883—a Government of honesty and justice And what the English District Officer was in 1883, he is in 1900, a just man, only wishful to do justice amongst the people whom he rules The people of the districts of Bengal *assume and take for granted that an Englishman is just* When they have this opinion of their own countrymen it will be time to think of separating the two functions And when the educated classes, and the land-holders, are as law-abiding as they are in England, it will be expedient and necessary to weaken the executive and substitute a constitutional for a paternal Government Till this comes to pass, self-government, as the experience of the last sixteen years has shown, becomes a mischievous farce, and any attempt to weaken the executive by weakening the District Officer a danger to the Government, and a distinct injury to the people at large If then the stain cast on British administration by the existence of the present system is purely imaginary, I fail to see what we are to gain by the introduction of another system, which will undoubtedly taint the judicial administration and obstruct the executive

As for the scheme put forward by Mr Dutt, and which has been supported by the memorialists, I can only criticise it generally, for I have had no active part in administration for some years, and there have been changes in the details of the appointment of officers, especially subordinate officers, with which I am not so familiar as formerly

But on the face of it, the scheme appears to me crude and impracticable

It is proposed in a general way that Magistrates and Judges should henceforth be the representatives in districts of the Executive and Judicial Departments respectively, and that a division of the Deputy Magistrates should be made, half going to the Judicial, half to the Executive Assistant Magistrates will be employed at first purely on executive duties When they are of sufficient standing they will commence judicial duties as Joint Magistrates As Assistant Magistrate they will be under the control of the Magistrates As Joint Magistrates they will be under that of the High Court alone The Judges will, so far as I can gather, be recruited from the ranks of the Joint Magistrates or perhaps it may be intended from those of the Judicial Deputy Magistrates. The Judges will have the responsibility of supervising all Judicial Officers throughout the district Subdivisions will be manned by a couple of officers, one a Deputy Magistrate for judicial work, the other a Sub-Deputy Magistrate, or as afterwards suggested, a Deputy Magistrate in important subdivisions, for the supposed comparatively light executive duties, but all this will be effected, as some say, without the cost of an additional rupee, or as Mr Dutt is afterwards compelled to admit, at comparatively trifling expense

Now it is apparent that such a scheme involves an increase in the number of Joint Magistrates There are only 22 Joint Magistrates at present, and if, in addition to the trial of cases, the work which the Magistrate now does in the Judicial Department, exclusive of that which under the scheme falls to the Judge, is put on the Joint Magistrate, that officer will certainly require a strengthening of his establishment, and each district (there being 44) will require to have a Joint Magistrate

The Joint Magistrate will do judicial work only, instead of as at present being also available for executive duties What judicial powers is he to have, and whence is the grade of Joint Magistrates to be recruited ? Ordinarily, I presume, he will be appointed from the Assistants But, under the scheme, the Assistants will have no judicial experience whatever, and the Joint Magistrate, if he only has third class powers, will commence doing the judicial work which an Assistant, under the present system, performs Or if he has higher powers, he will exercise them without any judicial training whatever, being debarred while Assistant from trying any cases at all If this system is to go on, the number of Assistants too will have to be increased to recruit the ranks of Magistrates and of Joint Magistrates, who will now be entirely separated

The adoption of the scheme too will simply destroy the subdivisional system which is the grand training ground for young officers both in executive and judicial work What the District Magistrate is to the Government, the Sub-divisional Officer is to the Magistrate, and any weakening of his position in the subdivision is *pro tanto* a weakening of the authority of the Magistrate and of Government The subdivisions were established for the purpose of strengthening the executive and also for the training up of young officers to worthily represent Government as District Officers The idea of degrading—I can use no other word—the Sub-divisional Officer to the position of so subordinate a rank as Sub-Deputy Magistrate, is altogether out of the question, and shows that Mr Dutt has altogether failed to grasp the meaning of the subdivisional system

Apart altogether from the *policy* of the question, Mr Dutt's scheme will undoubtedly lead to expense At present there is no doubt as to who is to occupy the subdivisional house— it is the officer in charge of the subdivision, and any Sub-Deputy Magistrate attached to a subdivision has to find quarters for himself But with two officers appointed, one a Deputy Magistrate and the other a Sub-Deputy Magistrate or both Deputy Magistrates, the question of *quarters* will at once arise Both will claim to have the subdivisional house, both cannot live in it with their families, additional quarters will certainly have to be provided for one of the two officers So also additional *establishment* for office, both men and buildings, will have to be provided The cutcherry of the present Sub-divisional officer is generally of a humble type Under no circumstances will it suffice for two officers, and the executive, equally with the Judicial, Officer, requires an office The establishment of Sub-divisional Officers at present just enables him to get through his work He doubles up the men he has, one man doing executive as well as judicial office work If the work is separated, the man cannot be divided, and separate work done by separate officers, will undoubtedly lead to separate establishments—from clerks down to peons Further, the separation system will undoubtedly lead to unseemly disputes and fighting betwen the rival claimants for position Put two native Deputy Magistrates, each with possible claims to be the *Kortta* of the subdivision, and there will be quarrels within a month, to the delight of the subordinates, the joy of all the bad characters in the place, and the injury to all administration, whether judicial or executive Every Bengali knows the evil of the system of co-wives Every bride prays against the possibility of a *satin*, and uses most uncomplimentary language to the possible sharer of her position With the advent of a *satin* peace is at an end—"The man who has two wives has a bad time of it," says the proverb And so under the scheme of Mr Dutt every subdivision will become a *dosatina* (the abode of two wives), and Government will most certainly illustrate the proverb of having a very bad time of it indeed

Whence, too, are the Judges to be recruited ? From the Joint Magistrates, I presume whose time will have been spent in forgetting the little knowledge of the people which they acquired as Assistants, and the Judges will then be officers who will have little or no acquaintance with the customs and habits of the people, except what they have learned in the Courts, where, *teste* Mr Dutt, chicanery and falsehood abound The Judges will have a large increase of work, correspondence—criminal appeals which now go to the Magistrate—inspection and supervision of a considerable number of Judicial Officers, both at head-quarters and at subdivisions Where will they find time to do this ? At present the Judges declare they are heavily worked They are tied to their desks, and the flying inspections which they now make in leisure moments to Munsiffs' Courts will be of little use if the same kind of inspection is applied to Judicial Officers in the Criminal Department I do not speak without knowledge of Munsiff's inspections, and I have no hesitation in saying that they are little better than nominal With all this increase of work what will indubitably happen ? More Judges, or fresh Additional Judges as they are called, will be required Where are they to come from ? It is asserted that the appellate work which will be thrown on Judges by the transfer of appeals now heard by Magistrates will be trifling, and Mr Dutt instances his being able to dispose of all the criminal appeals which came before him in about two to three hours a week I observed that in 1898 there were in the district of Mymensingh where Mr Dutt served, roughly speaking, about 500 criminal appeals to the Magistrate in the year To get though these in two or three hours a week suggests a cursoriness of hearing of which I am sure, appellants, equally with judicial authorities, would disapprove The Judges as a body at present would not call their criminal appellate work *light* There are, I perceive, about 7,500 appeals per year heard in District Courts, *plus*, say, 2,300 revision cases, total, say, 9,800 The number of Magistrates' appeals is about 5,500 per annum, revision cases 2,000, total 7,500 If then the amount of the District Judge's appellate work is increased by about 76 per cent how is it to be performed? It cannot possibly be done without an increase in the number of Judges or Additional Judges, for the Joint Magistrates will not be able to aid in this, and increase of Judges means also increase of establishments, and such increase of staff means great increase of expense

As for the Deputy Magistrates, there can similarly be no doubt that the number under the new scheme must be largely increased It is very easy to say that the work now done will not be increased True, but it will be differently divided, and as the two departments are to be separated, the help which the magistrate now gets from all his subordinates will be very sensibly diminished when the available staff is reduced by half With, say, four Deputy Magistrates, a District Magistrate gets through the work of head-quarters If the officer, say, in charge of the record-room and treasury, falls sick, the Magistrate, out of his three remaining Deputies, can supply his place But if he has only one Deputy Magistrate, who has all other heavy executive duties to perform where is he to find a *locum tenens* for the treasury and record-room? If again, a Deputy Magistrate now employed on judicial duties under the Magistrate falls sick, or takes leave, one of the three remaining officers can be employed to take his place, but if there is only one Judicial Deputy in reserve, where is the Judge to find a substitute for the absent man, and what is to become of all the witnesses who have been summoned to attend at the Court of the latter? It is obvious that with this division of labour, as contemplated under the proposed scheme, the numbers both of Executive and Judicial Deputy Magistrates must be increased

Now, where are the increased European recruits to be found for the ranks of Assistants, Joint Magistrates, and Judges? They will not be procured from the ranks of the Covenanted Service Why not take them from native officers? Quite so, they will be available, and thus, as the "advanced Liberal Party" foresee, the Judicial Service will soon pass into the hands of Bengalis

I have put down these general remarks to show that, as regards efficiency of administration, the proposed scheme is crude and undigested Its adoption will certainly detract from the character of the administration under the present system I am quite unable to discover in what respects any gain or advantage will be secured, and without doubt the expense will be enormous

I may, therefore, sum up what I have said as follows —

(*a*) The combination of executive and judicial functions in the rulers is a fundamental principle of Oriental administration, it has existed from the earliest times, it is acted upon to this day by the people of Bengal

(*b*) The combination system has been acted upon during this century, and has been the key-note of our administration

(*c*) The system has been discussed over and over again, and its retention has been as repeatedly declared necessary for the efficient maintenance of British rule in India

(*d*) The system has been a marked success, it has enabled the Government, through its officers, to give the people justice, and to make them recognise in the British administration, an administration strong, humane, impartial, and just

(*e*) The necessity for the maintenance of the system was exhaustively discussed and resolved on so late as 1883, and both in that year and previously the weight of evidence in support of the system immensely outweighed that offered against it

(*f*) Admitting that after long centuries of effort the combination system has been introduced in England, its adoption on that account in India does not follow

(*g*) While the soundness of the principle for England may be granted, and while progress towards the introduction of the English system in India may be recommended, the circumstances of the people of Bengal do not at present admit of its adoption as in England

(*h*) The combination system is in 1900 as necessary for the efficient maintenance of British rule in Bengal, or in India, as it was in 1873, or in 1883, and its abandonment would constitute a political danger, and a distinct injury to the people at large

(*i*) The present movement is in reality dictated by the Indian Congress, a small section of the community, whose methods are those of political agitators

(*j*) The movement is practically confined to Bengal, and even there it is not supported by the community, by the European residents in India, by the educated community at large, by Muhammadans, by any in short but a few political agitators, and by the portion of the landed proprietors, who follow the leading of the Congress

(*k*) The movement is directed with the object of placing the whole judicial administration in the hands of natives of Bengal—a result which would certainly not improve the character or efficiency of the Judicial Department, and would indubitably tend to cripple and obstruct the executive, which means the Government of India

(*l*) The natives of Bengal, as is shown by experience and on the testimony of their own countrymen, have signally failed, through lack of moral qualities, to be Executive Officers when left to themselves and without effective control The same moral qualities are required in the judicial administration

(*m*) The scheme for the division of labour put forward by Mr Dutt is crude and impracticable It would lead to no gain in administration, and would certainly be expensive

(*n*) When the Bengalis are fit to have the separation system as in England, there is no reason why they should not have it, but the time is not yet

(*o*) An experimental trial of the system in any advanced district is inexpedient, as shown by the condition of the so-called most civilized district in Bengal

(*p*) The alleged instances of abuse are shown by investigation to be exceptional, to be due not to any defects in the system, but to the occasional indiscretion or censureable action of officers, but such exceptional circumstances which are common to men whether employed in executive or judicial capacities, constitute no real practical evil attributable to the system, which has been such an administrative success

(*q*) On the whole, the present system is of real benefit to the people, commands their confidence, meets, their wants, and at present requires no such modification as is contemplated in the scheme under discussion

S. G. P. I., Delhi.—No 258 H D.—13-8 1913—100.

Appendix IX.

MEMORANDUM.

1 The first of the two main questions which are formulated for discussion in paragraph 4 of the Home Department letter no 523, dated 31st March 1900, is "How far the combination of executive and judicial functions in the same hands actually leads to abuse, whether there is any practical evil to be remedied, and if so, of what nature and degree"

In my judgment the reply to this question is that the practical evil resulting from the combination of the two classes of functions is not great, nor is it increasing, but evil results do ensue, which are not imaginary or theoretical, and are of not inappreciable extent

2 The evil may arise, broadly speaking, in two ways The memorial does not seem to clearly distinguish between these, though they are of very different degrees of importance, and though Sir Charles Elliott, in his article in the Asiatic Quarterly Review, has indicated the distinction between them In the first place, it is possible that a District Magistrate who is officially interested in a criminal prosecution or appeal, either by reason of his having initiated the proceedings or by having taken a part in the preliminary enquiry or otherwise, should take up the case or appeal, and proceed to try it himself

3 Now, if this were really liable to occur, it would be a very serious abuse I cannot in the least agree with the views expressed in this connexion by Sir Charles Elliott at page 26 of the papers forwarded with the Chief Secretary's letter Sir Charles Elliott writes —"To say that weak evidence will seem strong to him because he heard it before the trial, or that he cannot appreciate the force of new evidence because he did not hear it before, is unwarranted" To my mind this is sheer special pleading If a District Magistrate has taken a personal, and not merely a technical, part in instituting a prosecution or conducting a preliminary enquiry, he cannot have failed to form an opinion—possibly a decided opinion —as to the facts He may, and probably will, feel "morally sure" of the guilt of the accused person, and when that is the case, the evidence adduced at the trial will, almost necessarily, present itself differently to his mind from what it would do to a person without previous knowledge of the case In such circumstances, most people will probably agree that the accused person would be in danger of not getting, and would never believe that he did get, a fair trial

4 But, just for this very reason, I do not attach much practical importance to the possible evil that might arise from this cause It is well known that District Magistrates in Bengal try scarcely any cases* themselves And, at the present day, it is scarcely conceivable that any District Magistrate would seek to try a case in which he had an active (and not merely a formal) interest The High Court would instantly interfere, and his act would meet with severe and prompt punishment at the hands of the Local Government It will be seen that among the instances cited in Mr Monmohan Ghose's memorandum, there are only three, nos 1, 6, and 10, which profess to illustrate this form of abuse Of these, the first and third occurred in 1876, and the second (the accuracy of which is challenged by Sir Charles Elliott) in 1874 The scandal arising from this form of indiscretion is so great, and the support which the agitation would obtain from authenticated instances is so valuable, that it is fair to assume that no other case was known to the memorialists or to Mr Monmohan Ghose as having occurred during the last 25 years

*They try appeals, but complaints on this score are practically non-existent

It seems, therefore, that the evil which is theoretically possible from the direct use of the District Magistrate's judicial powers is practically extinct and has no present or recent existence

5 This, however, cannot be said of the second form which the evil due to the combination of functions assumes This arises from the control which the District Magistrate is empowered to exercise, and does daily exercise, over the subordinate Magistrates, by whom the great bulk of criminal cases are tried The exercise of this control is the crucial point of the objections to the existing system It is a necessary part of the District Magistrate's duty to distribute the cases arising in his district among his various subordinates for trial, and to withdraw and transfer cases for cause shown It is also a necessary part of his duty to watch the manner in which the cases are conducted by them, and to report on their qualifications to Government, thus largely affecting their promotion and prospects It is also a part of his duty to supervise their proceedings (as well as merely to watch them), and to assist them by advice and admonition, in the manner described by Sir Charles Elliott in the third paragraph of page 26 of his article above referred to

6 The exercise of these powers not merely gives an injudicious District Magistrate the opportunity of directly interfering with the conduct of cases, but also indirectly affects the judicial action of the subordinate Magistrates If the former were the only result, it might possibly be checked by the intervention of the High Court and the executive Government, though the recorded cases quoted by Mr Monmohan Ghose and others that might be quoted show that these safeguards are not always effectual. But the indirect and only partly conscious effects of the power of control are vastly more insidious, far-reaching, and important It is right—it is in my judgment essential—that the work of the subordinate Magistrate should be subject to regular, constant and systematic control, for they cannot be relied on, more than

any other class of subordinate officials, to do their work diligently, accurately, and intelligently without it But if the control is exercised by the officer who is responsible for the peace of the district, and if his opinion can make or mar their future prospects, there is the constant danger that in doing so he will not be exclusively guided by judicial considerations That the District Magistrate will not consciously permit extraneous considerations to enter his mind may be admitted but it is placing too great a strain on human nature to expect any man to exclude them effectually and always The subordinate Magistrates, alive to the importance to them of their superior's favourable judgment, unconsciously adapt themselves to his unconscious bias I fully believe that they very seldom wittingly do an injustice but the inevitable result is that criminal trials are not conducted in the atmosphere of cool impartiality which should pervade a Court of Justice

7 When I was Deputy Commissioner of Manbhum some years ago, I had occasion to order the prosecution of a number of ghatwals for refusing to obey an order which I had passed upon them under the Police Act When the trials had progressed some way, the Deputy Magistrate before whom they were proceeding came to my house and informed me that he felt very doubtful whether my original order was legally binding on the accused, and if so, a breach of it by them would not be punishable, but he wished to have my instructions before passing orders, as he was unwilling either to question the validity of my order, or to show a large number of acquittals in his returns It is fair to say that this Deputy Magistrate was a young officer of about three years' service, and I gave him a talking to which he will not readily forget So naive an admission is probably uncommon, but the feeling which induced it is inevitable and of constant operation It will scarcely be denied that it constitutes a practical and appreciable evil

8 Sir Charles Elliott's defence of the system, in the passage already referred to, seems to wholly miss the point It is certainly true that subordinate Magistrates are prone to the faults which he enumerates—procrastination, want of proportion in sentences, want of care in ascertaining the real gist of the case, prolixity, and the like It is certainly necessary that they should be subject to supervision for the correction of these errors The real point is, by whom should the supervision be exercised, and I have endeavoured to show that it cannot, without risk or evil, be entrusted to an officer whose mind is almost necessarily liable to be influenced by extra- judicial considerations

9 The above remarks are subject to the important qualification that the evil complained of does not extend to cases triable by the Court of Session The District Magistrate exercises no manner of influence over these cases, at least beyond the preliminary stage of commitment And it should not be forgotten that this class of cases includes all the most serious This important limitation is slurred over in the memorial, though it is referred to prominently by Mr H J Reynolds in his article in "India" for November 1896

10 The second question which the letter of the Government of India invites us to discuss is "whether there are any, and, if so, what, considerations on the other side, which must be set off against such abuses as may have occurred, and which tell in favour of retaining the present system"

11 By far the most important point which arises in connexion with this question is whether the change proposed would materially weaken the power and influence of the District Magistrate, so as to impair the authority of the Government of which he is the chief local representative It is difficult to overrate the importance of this consideration The District Officers have been justly described as the eyes and ears of the central Government It is on them that the Government relies in times of difficulty, trouble, or danger To their hands is entrusted the task of coping with plague or famine, with religious fanaticism or agrarian outrage I desire to subscribe entirely to the *dictum* of Sir Fitzjames Stephen, that "the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the natives would be dearly purchased even by an improvement in the administration of justice The only reference in the memorial to this real difficulty is contained in paragraph 17, the arguments in which are singularly feeble and fallacious Holding as I do that some reform is both expedient and practicable, I accept it as an essential condition that it shall be so framed as to leave unimpaired the power, influence, and authority of the District Magistrate, or if possible even to strengthen them further

12 And I venture to think that such a measure is possible, though, as will be shown hereafter, it will involve considerable expense In the first place, it is instructive to note what is the position of things in the Presidency towns Taking Calcutta as an instance, we find that there is no District Magistrate *eo nomine*, and that his place is taken by the Commissioner of Police This officer has no revenue powers, all work of that description being entrusted to a separate functionary, the Collector of Calcutta. But he possesses the whole of the police preventive powers, and discharges all the executive and miscellaneous duties which in a mufassil district devolve upon the District Magistrate And in marked contrast to the latter he possesses no judicial * powers whatever All original criminal jurisdiction is vested either in the High Court sitting as a Court of Session, or in the Presidency Magistrates, who are entirely independent of the Commissioner of Police, and who are strictly confined to the trial of cases Now it will, I think, be generally admitted that the powers, influence and authority of the Commissioner of Police are at least as strong and effective as those of any District Magistrate, and notwithstanding that the former's

* The Commissioner of Police and his Deputy are both vested with the powers of a Magistrate of the first class, but this is merely for technical reasons They try no cases and exercise no sort of judicial control The statement in the body of the memorandum is substantially correct

pay is less, his status and position are usually regarded as higher than those of the latter The conditions prevailing in a Presidency town are no doubt widely different in a variety of ways from those of a district in the interior But it is, I think, a legitimate inference that, where the local conditions are appropriate, the power and influence of the Chief Executive Officers are not less effective by reason of his not being vested with any judicial functions, or with control over the local Magistrates

13 Throughout the whole of the papers enclosed with the Chief Secretary's letter, it is assumed that the reform under discussion involves the withdrawal from the District Magistrate *en bloc* of *all* the powers which he now exercises under the Criminal Procedure Code, and no attempt seems to be made to discriminate between powers of different kinds It is possible that the opposition which the proposal has met with may be partly due to this cause The District Magistrate is responsible for the peace and order of his district, and for the maintenance of the authority of Government, and it is essential that he should possess such powers as are necessary for this purpose Prominent among these are the powers conferred by Part IV, Chapters VIII to XIII of the Criminal Procedure Code, which deal with the prevention of crime I venture to think that, for the purpose in hand, a clear distinction can be drawn between the prevention of crime and the adjudication of cases actually brought to trial I have endeavoured to show in the earlier part of this memorandum that the valid complaints against the present system arise from the exercise of powers by the District Magistrate in respect of the latter, either directly or by virtue of the supervision and control which he exercises over the subordinate Magistrates In the paragraph immediately preceding, it has been shown that neither of these powers is exercised by the Commissioner of Police in Calcutta, notwithstanding which that officer's influence and authority stand higher than those of an ordinary District Magistrate It is true that the Commissioner of Police also does not himself exercise powers under Part IV of the Criminal Procedure Code, but these are not material in Calcutta The number of such cases during 1898 was only nine in all My conclusion is, that, provided that the powers necessary for the prevention of crime are retained in the hands of the District Officer and his subordinates, it will be possible, in selected districts, without impairing his necessary influence and authority, to divest him of the direct power of adjudication and of the function of controlling the Subordinate Magistracy

14 If this suggestion should be taken into consideration, I venture to think that the power of appeal and revision of the District Officer's orders under Part IV of the Criminal Procedure Code should be vested in the Commissioner of the Division, and not in the Judge or the High Court The Indian Legislature has already gone some way in this direction By section 435 (3), Criminal Procedure Code, it is provided that orders made under section 143* and 144 † and proceedings ‡ under Chapter XII are not subject to the revisional jurisdiction of the High Court I believe that the Court has nevertheless ruled that they can interfere under the powers conferred by their Charter) Cases have been known in which the High Court has set aside proceedings under section 145 on the ground that the recorded evidence did not show that there was a likelihood of a breach of the peace In these and all other cases in which the matter for determination is not whether an offence has been committed, but whether an offence is likely to be committed in the future, the decision may rightly turn on extra-judicial considerations which frequently cannot be established according to the rules of evidence, and it should rest with the officer who is responsible for the maintenance of the public peace, subject only to appeal to, or revision by, his departmental superior, and not by the judicial authorities If this safeguard were applied, I think it probable that the influence and authority of the District Officer for legitimate purposes would be enhanced rather than otherwise

15 It is not expedient to lengthen this memorandum by discussing the particular districts to which the suggested reform should be applied But I may briefly state (1) that I do not suggest its extension to any non-regulation district, (2) that it would be expedient to apply it tentatively in the first instance to a few districts only, in order that its practical working may be watched, and (3) that the most suitable districts for its first introduction are those near the Presidency town In the 24-Parganas, for instance, with which I used to be well acquainted, the District Magistrate has little or no non-statutory power, *i e*, if he cannot quote legal authority for any order, his personal influence will scarcely ever enable him to get it carried out In such a district his indirect § influence over the subordinate Criminal Courts is of little practical effect To withdraw it will scarcely affect his authority at all . whereas if the suggestion made in paragraph 14 were adopted, and all preventive powers were entrusted to him subject only to the control of the Commissioner, his statutory authority would be materially enhanced.

16 Turning now from the consideration of the effect of the proposed separation on the position of the District Magistrate, there are two other points which have been suggested to me In the first place, it has been observed that by reserving a certain number of Deputy Magistrates in each district for judicial work exclusively, we should transfer a large proportion of the Subordinate Executive Service to the control of the Judge and the High Court, and should largely reduce the staff at the disposal of the District Magistrate This objection is valid, and it is no answer to say that the work for them to do

* Orders prohibiting the repetition of a nuisance

† Temporary orders in urgent cases of nuisance or apprehended danger.

‡ Disputes as to immoveable property

§ It would not be understood as approving the exercise of this indirect influence I merely refer to facts as they are

would be reduced in the same proportion I propose to meet the difficulty by making the transfer to judicial duties not permanently, but for a term of years only, say five This is what is done in the case of Deputy Magistrate-Collectors, who are deputed for a time to special work, such as the Excise and Settlement Departments, land acquisition work, and as Personal Assistants to Commissioners of Divisions No difficulty is experienced in withdrawing these officers at any time to the regular line and by this plan their subordination, not to the District Magistrate but to the Local Government, would be preserved

17 The other point to which I may briefly allude arises out of the essential difference between civil suits and criminal cases In the former the matter at issue is merely one between man and man, the decision of a subordinate Civil Court has no effect beyond the immediate parties to it, and the native Judge or Munsif approaches it with no bias either way In criminal cases, however, that is not so Every such case involves a question between society at large and the accused person And by reason of national temperament and the curious but undoubted weakness of the sense of public rights* which is characteristic of Bengalis, the native subordinate Magistrate is almost always subject to an unconscious bias in favour of the accused This bias needs correction, which is at present applied by the District Magistrate This objection also is valid, and I propose to safeguard against it in the manner indicated below I admit that the correction is necessary, and also that it cannot be effectually applied by a mere appellate court

18 From the foregoing it will be seen that, to the best of my judgment, the combination of executive and judicial powers does result in practical evil which, though not very great and showing no signs of increase, is nevertheless appreciable and neither imaginary nor theoretical, and that the difficulties in the way of separating the functions are such as can be surmounted There is, I think, a reason why we should endeavour to do the latter I refer to the steady growth of opinion in England as well as in India, that the union of functions is only appropriate to a primitive and early stage of development, out of which this country is slowly passing Sir Charles Elliot has rightly said that the Indian Administration is modelled rather on the Continental than on the English system But even the Prefect of a Department of France has no judicial powers, and exercises no kind of control over the *Juges de paix*, or the *Tribunaux correctionels*, which correspond to the Indian criminal courts of first instance The nearest parallel I know of is in Ireland, where the Resident Magistrates exercise judicial functions under the Crimes† Act, while they are vested with large powers over the Royal Irish Constabulary This precedent is not perhaps likely to appeal very strongly to an English public The feeling that in India there is too much interference by the Executive Government with the Courts seems to be growing Not many years ago the Secretary of State directed that Local Governments should refrain from public criticism of judicial decisions, I understand, even of the subordinate courts What I apprehend is that under growing pressure the Government may be forced at no distant date to carry out complete separation, in conformity with the only system which the English nation know or understand This pressure is growing, it may before long become irresistible And I think it will be wise, instead of offering a stubborn but ineffectual resistance, to yield to it while there is yet time to guide the reform into safe channels For this reason, therefore, notwithstanding that the evil to be remedied is not ‡ great, I venture to think the balance of advantage lies in favour of making a cautious advance in the direction of a reform which is certain to come

19 I now turn to a consideration of Mr Dutt's scheme If the separation of the powers is ever to be carried out, it is inevitable that a leading feature of the change should be the reservation of a certain number of the Subordinate Executive Service for criminal judicial work, under the sole control of the higher judicial authorities To that extent Mr Dutt's scheme proceeds on sound lines But beyond this I do not think there is much to be said in favour of it It is in particular disfigured by two cardinal defects which would be productive of so serious a loss of efficiency as to render the scheme as it stands impossible of acceptance The first of these is the proposal to abolish the control and supervision now exercised over the Subordinate Magistrates by the District Officer, and to substitute nothing for it except the utterly imperfect and incomplete control exercised by the Appellate Court The ordinary functions of a Court of appeal are limited to a revision of the finding of the original court, at the instance and in the interests of only one of the parties to the case, *viz*, the person convicted Cases in which the accused has been acquitted scarcely ever come before the Appellate court at all, and in appeals against convictions, the court is primarily concerned with the finding as to the guilt or innocence of the appellant, and gives only a secondary consideration to other matters that may be deserving of notice in the proceedings of the Magistrate The second great defect of Mr Dutt's scheme is the proposal to convert the peripatetic Sub-divisional Officer into a stationary judge, and to withdraw revenue and executive work from sub-divisions, or relegate it to Sub-Deputy Collectors § If the District Magistrate is the eyes and ears of the Government, the Sub-divisional Officer is the eyes and ears of the District

* A very common illustration of this feature of the national character is the incessant encroachments made on public roads and drains No private person ever thinks of objecting (unless he has a private quarrel with the encroaching party), and attempts to restrain them are universally unpopular

† They also, I believe, have judicial powers under the ordinary criminal law but only in conjunction with non-stipendiary Justices

‡ When the Indian Congress speak of it as causing "incalculable oppression," they are guilty of absurd exaggeration, seriously injuring a good case

§ Except in some 20 unspecified sub-divisions, for which he suggests the appointment of additional Deputy Collectors.

Magistrate in his subdivision This suggestion is not much more reasonable than if it were proposed to abolish the District Magistrate altogether, transferring his judicial powers to the Judge and making no provision for the rest I believe Mr Dutt to have been far too capable and experienced an officer not to be aware of these patent defects of his scheme, and it is probable that he was largely influenced by the desire to show that the reform could be carried out with little or no extra expense This I believe to be quite impossible, except with a fatal loss of efficiency

20 In the following suggestions I have endeavoured to avoid the objections to which Mr Dutt's scheme is open It will be seen that if they were extended to the whole of the Regulation Districts of Bengal, the additional cost involved would be about five lakhs per annum It should be understood that though for the sake of clearness, I describe the following scheme so as to cover all the Regulation Districts, I do not recommend its immediate or proximate extension to anything like all of them My views on this point have been stated in paragraph 15

21 (*a*) In each of the 37 Regulation Districts there should be appointed an Officer to be styled "District Judge" These officers should be divided into two grades, on Rs 1,200 and Rs. 1,500 per mensem respectively (as in the Punjab)

(*b*) The District Judge should exercise the powers now entrusted to an Assistant Sessions Judge under the Criminal Procedure Code, with the exclusive power of hearing appeals from and applications for revision of the decisions of Magistrates of all grades within his district He should distribute all cases as they arise among the subordinate Magistrates, or should assign this duty, and the power of receiving and distributing criminal complaints, to one of the latter He should be empowered to try European accused in cases where for any reason this cannot be done by the subordinate Magistrates He should also be vested with the full powers of a District Judge under the Civil Procedure Code, subject to the control of the Divisional Judge referred to below

(*c*) For every division there should be appointed a Divisional Judge, exercising the powers of a District and Sessions Judge under both Criminal and Civil Procedure Codes throughout the division For some divisions more than one * Divisional Judge would be necessary, and probably eleven such officers might be required for the eight Regulation Divisions Their salaries should be Rs 2,500 and Rs 2,000, respectively

(*d*) The District Judge should be subject to the supervision and control of the Divisional Judge in both civil and criminal jurisdiction The latter should try all sessions cases which the District Judges were not competent to try, and should have the power to transfer cases from one court to another.

(*e*) At the head-quarters of each district one or more subordinate Magistrates, Joint, Assistant, or Deputy, should be exclusively reserved for the trial of criminal cases triable by a Magistrate In the case of the Subordinate Executive Service, the appointment of an officer for judicial duties should ordinarily be for periods of five years at a time In the case of Joint or Assistant Magistrates the appointment should be for such periods as might be convenient in each instance But in respect of all three, the rule should be clear that no officer shall be simultaneously vested with judicial powers and powers † of any other description It might be desirable to emphasise the division of duties by a division of nomenclature thus, there might be Deputy Magistrates and Deputy Collectors, but no officer should be at the same time both a Deputy Magistrate and Deputy Collector

(*f*) The District Officer should cease to exercise any judicial or appellate powers, or any power of supervision and control over the subordinate Magistrates, all of which should be vested exclusively in the District Judge, subject to the control of the Divisional Judge

(*g*) But powers under ‡ Part IV of the Criminal Procedure Code should be vested solely in the District Officer and his subordinate Deputy Collectors, Assistant Collectors and Joint Collectors, subject only to appeal to, or revision by, the Commissioner of the Division

(*h*) For sub-divisions there should be a three-fold system—

(*i*) In the largest and heaviest sub-divisions there should be two officers—a Deputy Magistrate and a Deputy Collector, the former for judicial work (and charge of the Sub-Treasury where necessary) and the latter for revenue and executive work,

(*ii*) In the smallest and lightest sub-divisions the combination of functions should be allowed to continue for the present, the Sub-divisional Officer remaining subordinate to the District Officer for revenue and executive purposes, and to the District Judge for judicial purposes; and

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* In the Punjab there are 13 Divisional Judges, but only six divisions

† I would make an exception in favour of the charge of the Treasury, which might be combined with judicial powers

‡ There are some few powers in Part IV which can only be exercised at a criminal trial, *e g*, powers under section 107 These should be exercised by the District Judge and his subordinates, and not by the District Officer and his subordinates These can readily be picked out, and I do not complicate this scheme by enumerating them

(iii) In the remainder, a critical examination should be made of the volume and importance of the two classes of work, and the Sub-divisional Officer should be retained, either for judicial work only, or for revenue and executive work only, according as the importance of the one or the other preponderated

(j) The District Judge should be required to inspect the office of every Magistrate at head-quarters at least once in three months, making a detailed examination of the records of at least six cases decided in each month, not being cases which had come before him in appeal or revision, and including a proportion of cases ending in acquittal or discharge Similarly, he should be bound to inspect the office of every Sub-divisional Officer exercising judicial powers at least once in six months He should be required at each inspection to record a full note showing not merely the merits and defects elicited by his general inspection, but also at length all errors or faults apparent in the particular records examined Copies of this should be forwarded to the Divisional Judge, and the Commissioner through the District Officer

22 Members of the Civil Service are now required to elect in the twelfth year of service between the Executive and the Judicial branch, and this usually occurs at a time when they are substantively District Magistrates of the third grade Under the system now proposed the election would usually fall to be made after an officer had been for some time a substantive District Judge and after he had officiated for some time as Collector As the office of Collector is of higher importance and responsibility than that of District Judge as now suggested, it is right that the latter office should be reached earlier in a man's service than the former

23 The reservation of certain officers for judicial work at head-quarters and the duplication of officers at heavy sub-divisions would necessitate an increase of the Subordinate Executive Service I assume that on an average one additional officer would be required in each district It may be said that as the work to be done remains the same, this involves some waste of power That, however, is inevitable if there is to be a division of duties It was equally inevitable under Mr Dutt's scheme, although he neglected to make allowance for it

24 The following is an estimate of the additional cost involved in the event of the scheme being extended to all the Regulation Districts of the province —

Proposed scale

	Monthly cost Rs	Rs
(1) 11 Divisional Judges—		
6 at Rs 2,500	15,000	
5 at „ 2,000	10,000	
TOTAL		25,000
(2) 37 District Judges—		
20 at Rs 1,500	30,000	
17 at „ 1,200	20,100	
TOTAL		50,100
(3) Establishment—		
11 + 37 = 48 at Rs 1,000 *		48,000
(4) Additional Deputy Magistrates, etc —		
37 at Rs 470 (average pay)		17,390
(5) Establishment for Deputy Magistrates, etc —		
37 at Rs 50		1,250
TOTAL		1,42,640

Present scale

(1) 29 District and Sessions Judges—		
15 at Rs 2,500	37,500	
14 at „ 2,000	28,000	
TOTAL		65,500
(2) Establishment (actuals)		32,160
TOTAL		97,660
Increase per mensem		44,980

25 The net increase would thus be about Rs 45,000 per mensem or Rs 5,40,000 per annum Form this, however, there would be some deduction on account of the Assistant District and Sessions Judges, of whom I think four are now employed, and who would no longer be necessary It is also possible that a slight reduction might be made in the present number of Subordinate Judges On the other hand, it is not unlikely that an average increase of one Deputy Magistrate or Deputy Collector per district might not be found sufficient The net cost may therefore be taken at about five lakhs a year, exclusive of the cost of buildings, for which it is hardly possible to make an estimate

* This is slightly less than the average monthly cost of the establishment of a District and Sessions Judge

E. N BAKER,

Secretary to the Government of Bengal.

DARJEELING,

The 11th July 1900.

S. G. P. I., Delhi—No 258 H D.—13 3 13—12.—R. S. W.

Appendix X.

1 The first thing that strikes one in looking at the signatures to the memorial is that only two belong to gentlemen with any experience outside the Presidency towns

2 I have not had access to the documents quoted, but it is quite clear that the references have not always been fairly given Thus it is obvious from the close of paragraph 7 that if Mr Grant was opposed to the combination of Collector-Magistrate, it was because he contemplated the control of the Magistrate by the Commissioner, whose main duties would then, as now, have been concerned with revenue matters

3 In paragraph 15 the objections to the proposed changes are very unfairly stated No one denies that the system of combination sometimes leads to abuse, but what many would, and do, urge is that, on the whole, it leads to less injustice than any other system which could be devised So stated, the answer given in paragraph 16, that the objections are incompatible, disappears

4 These criticisms, however, deal with comparatively unimportant points, the really interesting thing in the memorial is that it should be based on Mr Monmohan Ghose's list of cases in which miscarriages of justice occurred between 1874 and 1894 It is not correct to say, as asserted by the memorialists, that these are but typical cases taken from a large number On the contrary, they are a very fairly complete list of cases which attracted public attention in Bengal during the period they cover, and, considering the avidity with which the native press seize and gloat over any such incidents, we may be pretty certain that there are few omissions, as local bars are not slow in picking up and communicating to the native press any cases which may be used to discredit the magistracy

5 I have not access to the records of the cases referred to by Mr Monmohan Ghose, but as an instance of the evident unfairness with which the statement was compiled, I may refer to the eleventh case where Mr Monmohan Ghose insinuates that the finding at the inquest must have been perverse because no water was found in the stomach of the man supposed to have committed suicide by drowning Mr Monmohan Ghose was a barrister with very large criminal practice, and it is asking a great deal if we are told to believe he was so ignorant of medical jurisprudence as to have made the insinuation in good faith

6 Perhaps I have spent too much time over some outside aspects of the memorial, as, after all, the question is not whether the memorial is wise or foolish, fair or biassed, but whether the union of judicial and executive functions in the Magistrate of the District is, on the whole, mischievous or beneficial There remains, however, one point which deserves to be noticed before dealing with the main question, and that is "the general voice of public opinion in India" which is so prominently put forward in the memorial. The public opinion is not that of the masses in India, but of a comparatively small class which may be described as composed of those who have received an English education The class is one which has considerable influence and which is able to make its opinions heard Its backbone is the legal profession, which is here in India so powerful that there is considerable justification for the assertion that we are now under the *vakil raj* Pleaders as a class are not in the least interested in justice being done, but they are very much interested in litigation being as extensive and protracted as possible No doubt disorder, pushed beyond a certain point, would injuriously affect their emoluments, but this is beyond their ken

7 The general principle on which the opposition to the present state of things is based is that no man should take part in a case in which he is in any way interested, or have any control over persons who take part in such a case On the other hand, it will probably be generally admitted that equal care must be taken that the trying officer is not from the very outset biassed in favour of an acquittal

8. How far is the District Magistrate an interested party? He is, no doubt, the head of the police in his district, but there is an officer—the District Superintendent of Police—subordinate to him in immediate charge and he does not go into details or do any of the actual detective work, nor does he, except in very exceptional cases, supervise it in detail. He merely sees that the work is being conducted on right lines A competent District Magistrate will also take measures to keep himself informed of other than police cases which may for any reason be important, but it is only under most unusual circumstances that he hunts up evidence himself or gives more than general directions, and his *amour propre* can only in very rare cases be concerned in procuring a conviction It will be noticed that only one of the cases cited by Mr Monmohan Ghose can in any way be attributed to revenue considerations though it might have been thought a District Magistrate might be biassed by them Any tendency to the imposition of excessive sentences is checked by the facts that appeals lie to the District Judge and that ample powers of revision are possessed by the High Court Even the limited extent to which the District Magistrate is interested in the trial of cases may, of course, lead, in some cases, to a miscarriage of justice (promptly to be rectified by the High Court), but I am firmly convinced that it stops a vastly greater amount of injustice.

9. The memorialists have looked only at the administration of criminal justice from one point of view, namely, the occasional imperilling of an innocent person, they have entirely left out of sight the danger of the wholesale acquittal of persons who prey on society

generally, and especially on the poorer and more helpless classes Again, looking at the matter from a political point of view, far more serious and lasting mischief has been done by the failure to bring to justice English soldiers who have committed heinous crimes than by all the cases put together in the appendix to the memorial It is notorious that, under present conditions, it is almost impossible to get a European punished for the most brutal and unprovoked offence, and especially in murder cases These miscarriages of justice do the most serious injury by filling the mind of the natives with the idea that justice cannot be procured against an European No doubt all the failures of justice that have occurred have taken place in trials conducted with the most scrupulous fairness and the most conscientious legalism, but the average Indian, just as the average Englishman would do, looks at the result—and he is not satisfied

10 I have stated that it is almost impossible to get a European convicted of the murder of a native of India I believe that in the case of rich natives I might go further and say that it is now in this province all but impossible to procure their conviction for any offence whatever Miscarriages of justice in such cases are not perhaps politically so mischievous, though it is not impossible they may materially contribute hereafter to agrarian disturbances, but the misery and desolation which a rich and unscrupulous man can cause is not undeserving of consideration, though the sufferers have no pressman nor congresswala to proclaim their wrongs

11 I have drawn special attention to the question of miscarriages of justice by wrongful acquittals because of its bearing on the question of any change in the present system of administration as regards criminal justice, and because I believe that it is too often overlooked (especially by barristers and others who have not much practical acquaintance with the conditions of the country), particularly as it concerns the poorer and more helpless classes No doubt it will seem to many an obvious answer that the fact of the District Judge being substituted for the District Magistrate in the control of the lower Criminal Courts will not make those Courts any more ready to acquit wrongly than they are now I believe this to be an error In the first place it is not even now uncommon for a Deputy Magistrate to acquit as being the easiest and least troublesome course He knows that an acquittal is very unlikely to be challenged if any fairly plausible grounds can be given for it On the other hand, a conviction in any difficult case, if it is to be upheld in the higher Courts, requires a careful examination of the witnesses and a full and complete analysis of the evidence It will probably be urged that satisfactory justice is done in the Civil Courts by Munsifs who are not controlled by District Magistrates I believe Judges, who have mufassal experience, will not rate the work done by Munsifs as highly as English barristers with no practical knowledge of the country are sometimes prone to do, but, be that as it may, in their case every order is appealable, so that they do their work in full consciousness of the fact that everything they do has to be justified Under the letter of the law, as it stands, there is nothing to prevent appeals from acquittals being as frequent as from convictions; but as every one is aware, the High Court would look with the greatest disapproval on any attempt by the local Government to freely use its right of appeal. At present, a Deputy Magistrate knows that if he were to acquit out of laziness, or with a view to avoiding responsibility, the matter would very soon attract the unfavourable notice of his superior officers, but this inducement to good work would soon be greatly reduced if he came under the District Judge.

12. It will probably be said if bad work of this kind attracts the notice of a District Magistrate, why should it not also attract the notice of the Judge? In the first place the District Magistrate's *raison d'etre* is inspection. This is very well put by Sir Charles Elliot, page 27 ("Those who urge this change . . administration of justice") Secondly, the District Magistrate is responsible for the peace of his district and for its freedom from crime, and he will therefore necessarily pay more attention to anything which is likely to exercise an unfavourable influence on it Thirdly, even if the Judge did take notice he would have to move the High Court if he desired to do anything beyond expressing more or less severe verbal criticisms of bad work Now the High Court is not adapted to administrative purposes and it probably could not be adapted to them without impairing its efficiency in purely judicial capacities The Judges would no doubt be prepared to take notice of anything of a very scandalous kind if it could be brought before them in a form suitable for a judicial or *quasi*-judicial proceeding, but the easy going and fairly intelligent Deputy Magistrate who took care to keep his record tolerably neatly, and who put nothing obviously absurd into his judgment, would escape scathless at their hands

13. I hold that the memorialists have entirely failed to establish their case even on the ground chosen by them, and I am firmly convinced that more, instead of less, injustice would be the result of the change they propose Before leaving this point I would draw attention to the fact that England is quite an exception in its methods of conducting criminal cases The English system is not in force in Ireland, nor I believe in any continental country There are historical and social reasons for its working tolerably well in England, but the memorialists have not attempted to show that they exist in India

14 The memorialists have endeavoured to prejudge the ground of administrative inexpediency by the use of the word *prestige*—a word quite sufficient to condemn anything in the eyes of a large number of clever men Whatever the views of the memorialists may be as to the functions of the State, they will probably admit that its first duty is to keep the peace To do this it is necessary either to entertain a large military force for police purposes, or else to have

a strong administration. Now every one with any administrative experience, and most people with any political sense, will appreciate that this strong administration is impossible if left to departments Departments must be forced to work together, and they must be forced to work together in a comparatively small local area This is now the case in a district, the district officer does hold in his hand a sufficient number of important offices to enable him to exercise considerable power No doubt, even now, district officers are too much department-ridden, but still a man who knows his powers and is determined to use them when necessary can effect a good deal The memorialists are apparently thoroughly consistent and proportionately unreasonable, for they appear to demand the instant separation of judicial and executive functions throughout India In this day go beyond Mr Romesh Ch Dutt who could not entirely lose sight of facts while actually employed in district administration, and he seems to have been vaguely conscious of the considerations I have mentioned, for he excludes from his scheme certain (non-regulation) districts Though the memorialists are blind to them, it is these considerations which are the cause of the present system and not "the prejudices and the customs of earlier times renewed, to some extent, in the unsettled period which followed the Indian Mutiny" The Indian Mutiny, no doubt, did emphasise the necessity of a strong administration, but it was before the mutiny that the question was taken up by Lord Dalhousie, and it was then taken up because the separation (a separation made after 1837 on theoretical grounds) had been found "injurious to the character of the administration and to the interests of the people" There is certainly no reason to suppose that a strong administration is less important now than at any previous period of our Indian history. It is unfortunately impossible to doubt that the influence of Europeans, as Europeans, is decreasing, and that even Government officers are far less able than of old to get things done simply because they wish them done, natives now are much more inclined to insist on Government officers showing they have the right to give an order All this is no reason for weakening the hands of district officers, especially at a time when plague has come, probably to stay for many years, and with wars and rumours of wars all over the world The memorialists speak of the question as if it were merely one of division of labour Were it not that two of those who have signed have had some district experience, I would have said that this pointed to complete ignorance of the state of things in the mufassal Relations are now frequently not over friendly between native Subdivisional Officers and Munsifs at the head-quarters of subdivisions, though they have very few points of official contact. There would, I have no doubt, usually be a state of more or less open war between the Deputy Magistrate of a subdivision trying cases and the Deputy Collector or Sub-Deputy Collector responsible for its peace

15 There are no materials in the Board's office for an estimate of the probable cost of giving effect to Mr Romesh Ch Dutt's scheme Probably about 80 extra Deputy Collectors would have to be appointed at an average cost of about Rs 300 a month, instead of the number estimated by Mr Dutt, and a number of extra Judges on Rs 2,000 to Rs 2,500 a month would also be required I do not, however, think financial difficulties alone would justify the memorialists' prayer being rejected if it were otherwise admissible.

R W CARLYLE.

11th July 1900

S. G. P. I., Delhi.—No. 258 H. D.—12-8-13—80—S. C. D.

Appendix XI.

No 695, Judicial, dated the 8th May 1901 (Confidential)

From—The Chief Secretary to the Government of Madras,

To—The Secretary to the Government of India, Home Department

I am directed to refer to your letter no 521 Judicial, dated 31st March 1900, forwarding, for the consideration and remarks of this Government, a memorial addressed to the Right Honourable the Secretary of State for India on the subject of the combination of judicial and executive functions in India In accordance with the desire of the Government of India, he opinions of the Judges of the High Court and of a limited number of experienced officers, representing both the judicial and executive branches of the service, have been obtained I am now to forward these opinions and to submit the views of His Excellency the Governor in Council upon the matter

2 Following the division of the subject adopted by the Government of India in your letter under reply, the first question for consideration is this Does the combination in the hands of the same officer of judicial (or rather magisterial) and executive functions actually lead to abuse? This question His Excellency the Governor in Council has no hesitation in answering in the negative, so far at least as this Presidency is concerned With the exception of one case, to which allusion will be made later, in which owing to a personal error of judgment the district officer permitted the the conversion of a simple magisterial case into a protracted departmental enquiry, no instance in which the combination of magisterial and executive functions in the same officer has led to abuse has come to the knowledge of the Government, or of the experienced officers consulted The absence of recorded instances of abuse in a province where vakils are found in every court, and each detail of the administration is jealously watched and freely criticised in the newspapers, is in itself sufficient justification for the belief that no noteworthy abuses have occurred If further proof is needed it is found in the fact that the combined experience of the Judges of the High Court, some of whom are ardent supporters of the demand for a reform of the existing system, produces but the one solitary instance, above referred to, in which the conduct of a magisterial enquiry can be said to have been in any way influenced by the interests of the executive administration

3 The fact that instances of the abuse of combined magisterial and executive powers are not forthcoming in this Presidency, might in itself be regarded as conveying a sufficient reply to the enquiry of the Government of India "Is there any practical evil to be remedied?" This Government feels, however, that the mere denial of the existence of any practical evil would be wanting in force unless it were accompanied by some examination into the reasons why in Bengal, where the law and the agency by which it is administered are the same as in Madras, instances of misuse of the combined functions from time to time occur which have no parallel in this Presidency From certain passages in the memorial and its enclosures, and from such information as His Excellency the Governor in Council has been able to gather on the subject, it seems that differences exist in the methods of district administration in the two presidencies which may account for these divergent results The connection between the District Magistrate and the Police, and the supervision exercised by the former over police work, is evidently far closer in Bengal than in Madras While the Superintendent of Police in a Bengal district appears to occupy a position closely approximating to that of a Personal Assistant to the District Magistrate for police purposes, the Superintendent in Madras administers his department for himself, conducting his business in a separate office, frequently at a considerable distance from that of the District Magistrate In regard to most of his duties he is subject to the control only of the Deputy Inspector-General and the Inspector-General of Police The intimate official relations which apparently subsist in Bengal between the District Magistrate and the Superintendent have thus no place in the system in force in Madras The intervention of the District Magistrate during an investigation by the police occurs only in very exceptional cases, and the allusion of the memorialists to the district officer, as the "detective and public prosecutor," is entirely inapplicable to the conditions of this Presidency

4 As regards the part taken by the District Magistrate in the judicial work of his district, and the opportunities afforded him of bringing his personal influence to bear upon the decisions of his subordinates, a similar divergency seems to exist between the systems in force in Bengal and in Madras In Bengal most of the magisterial work of the district is, it is understood, conducted at the head-quarter station, where the bulk of the magisterial establishment is concentrated The work of the whole staff is thus under the immediate supervision and control of the district officer, who moreover, as appears from the reports on Criminal Justice in the Bengal Presidency, himself tries a considerable * number of cases In Madras, on the other hand, there is at head-quarters with the District Magistrate seldom more than one Deputy Magistrate and he is frequently absent on tour The number of original cases tried by the District Magistrate himself is very small, only 76 cases, or an average of less than four cases for each District Magistrate,

* 1,685 cases were tried by District Magistrates in Bengal in 1899

having been so tried in 1899 out of a total of 304,216 cases brought to trial The magisterial work of each sub-division of the district is conducted entirely within the sub-division, and under the supervision of magistrates who reside each in his own charge, often at a distance of many miles from the head-quarters of the district, which they visit only at rare intervals. The vast majority of criminal cases thus proceed from institution to disposal without coming to the knowledge of the District Magistrate, whose supervision over the magisterial work of his subordinates is exercised partly by means of comments passed on calendars submitted for his perusal after the close of the proceedings, and partly by personal inspection of the work of the courts made during his tours The practice, stated by Mr Manomohan Ghose in enclosure II to the memorial, and alluded to in paragraph 13 of the memorial itself, under which it would appear that the whole current of magisterial business in a Bengal district is directed first to the court of the District Magistrate, whose duty it is to distribute the work among his subordinates, has no counterpart in this Presidency Not only does the existence of a large number of independent subordinate magistrates, each empowered to take cognizance of complaints, render such a concentration of power unnecessary, but the size of the District Magistrate's charge and the multifarious nature of his duties precludes the possibility of his undertaking such a task Nor can it be said as far as regards this Presidency that the exercise of appellate jurisdiction by the District Magistrate affords him opportunities of importing into the disposal of judicial cases conclusions based on extra-judicial considerations Just as the original magisterial work of each division is conducted without reference to, and without the intervention of, the District Magistrate, appeals from the decisions of the 2nd and 3rd class magistrates are disposed of by the divisional magistrate entirely on his own responsibility It is only in rare instances, as in the absence of a qualified divisional officer or where the original judgment is passed by a covenanted assistant magistrate without a division, that the District Magistrate himself undertakes the hearing of appeals from the judgments of his subordinates The number of appeals heard by District Magistrates in this Presidency in 1899, namely, 299 out of a total of 9,353 appeals presented to courts subordinate to the High Court, is in strong contrast with the corresponding figures in Bengal, where out of a total of 10,985 appeals disposed of by courts subordinate to the High Court, 4,659 are shown as having been heard by District Magistrates The latter figure probably includes appeals heard by Joint Magistrates specially empowered, but even allowing for a deduction on this account, the statistics point to a marked divergence in practice between Bengal and Madras

5. Enough has been said to show that the main objection raised by the memorialists to the existing system of administration—the danger of vesting the control of magisterial decisions in the hands of the executive head of the district—applies with but little force to the conditions prevailing in the Madras Presidency As regards subordinate officers, the combination of powers in their hands, except in so far as the exercise of executive functions places them under the control of the Collector, appears to be regarded by the memorialists as a matter of minor importance, and to constitute a theoretical rather than a practical objection to the existing system Whether in this respect also any difference exists between the systems of administration prevailing in Bengal and Madras which may render the judicial decision of officers in the former presidency peculiarly liable to be influenced by their executive predilections this Government is not aware As regards this Presidency he is convinced that the risk that judicial impartiality will be affected by executive interests is so slight as to call for no remedy While the Collector, as the head of the district, is more or less concerned with the working of each branch of the administration, the same cannot be said of the divisional officer In regard to those executive departments, the interests of which are regarded by the opponents of the existing system as especially liable to prejudice impartial judicial enquiry, namely, the Salt and Abkári Departments, the Sanitary Department, the Forest Department and the Municipal Department, the responsibility of the divisional officer is limited, the direction of the work of these departments devolves not upon him, but upon departmental officers whose duties are entirely executive, and who are not under his control Lower down the official scale the disjunction of executive and magisterial interests is carried even further, the duties of Tahsildars being almost solely executive, while those of the stationary Sub-Magistrates are entirely judicial How far this latter separation of functions, which has been in operation now for nearly ten years, has resulted in advantage to the administration is a question to which allusion will be made later for the present it is pertinent to point out that the result of the separation has been to place the bulk of the magisterial work in this Presidency in the hands of officers who exercise no executive functions, and whose decisions, so far from showing bias in favour of the executive administration, exhibit frequently a marked tendency in the opposite direction

6 From the foregoing observations it is clear that while the system as worked in this Presidency affords to the superior magistracy little or no scope for that deliberate prostitution of the judicial tribunals to the interests of the executive Government which constitutes the memorialists' chief indictment, the interest of the subordinate judiciary in executive matters is so slight as to afford small ground for the apprehension that it will imperil judicial impartiality That cases may occur in which a dishonourable subordinate magistrate will seek to improve his own prospects of advancement by making his judicial decisions conform to what he believes to be the view of his superior, His Excellency the Governor in Council does not deny The tendency of such a magistrate to misuse his powers for the promotion of his private ends would, however, not be corrected by the mere transfer of the control over him from the District Magistrate to the District Judge

7 Apart, however, from the question of the deliberate introduction of executive considerations into the disposal of judicial cases, there is another argument adduced by the memorialists to which it is necessary to refer In the summary given in paragraph 12 of the memorial of the grounds upon which the request for separation of functions is made, the contention is advanced that judicial functions cannot properly be exercised by an executive officer, seeing that the latter cannot, as a rule, approach the consideration of a case without previous knowledge of the facts, which in his executive capacity it is his duty to obtain An examination of the statistics of criminal justice in this Presidency suffices to show how untenable this contention is The Criminal Justice report for the year 1899 shows that 102,000 cases under the Indian Penal Code were brought to trial during the year Of these cases, more than half were of a private nature such as hurt, assault, mischief, criminal trespass, offences relating to marriage, defamation and criminal intimidation, the details of which can by no stretch of imagination be regarded as matter with which a district or taluk officer should become acquainted in his executive capacity Of the remaining cases, there was probably not more than one in twenty in which the magistrate, as an executive officer, had, before the case came on for trial, any occassion to acquire any knowledge of the facts In his magisterial capacity he would doubtless in many cases have received a police report under section 157, Criminal Procedure Code, and a charge sheet under section 170, by means of which he would have become acquainted with the nature of the case which he was about to try The receipt of such information, however, does not apparently fall within the scope of the memorialists' argument It is more open to objection than the receipt by a Sessions Judge of the record of the preliminary investigation in a case which is about to come before him In regard to offences under Special and Local Laws there is even less ground for assuming that an executive officer trying such cases usually, or even frequently possesses any previous knowledge of the facts. Of the 201,000 cases of this nature brought to trial in this Presidency during 1899, the bulk consisted of offences against (1) the Abkàri Act, (2) the Forest Act, (3) the Salt Act, (4) the District Municipalities Act, (5) the Madras Police Act, and (6) the Towns Nuisances Act Cases under the Abkári, Forest and Salt Acts, are dealt with by the departmental officer concerned up to the moment when they come to the Court for trial Cases under the District Municipalities Act, the Madras Police Act and the Town Nuisances Act, are usually of so unimportant a nature that it is only in the rarest instances that information in regard to them could be described as information which a district or taluk officer ought to acquire in the interests of his executive work A very large proportion of these latter cases is, moreover, tried by Special Magistrates or Benches of Magistrates who exercise no executive functions These considerations show therefore that, relatively to the total number of cases coming before the Courts, the instances in which this argument of the memorialists holds good are very rare When it is further remembered that nearly 80,000 cases are tried annually by stationary Sub-Magistrates who are purely judicial officers, it is apparent that, as far as this Presidency is concerned, the sweeping assertion of the memorialists rests upon a very slender foundation. Instances doubtless do occur in which the officer trying a case has private knowledge of some of its details Instances of this kind would, however, equally occur under any other system, and if the memorialists' contention were accepted that such knowledge must inevitably interfere with the impartiality of a magistrate's judicial decisions, the question would arise whether native officers, mixing freely with native society around them, could ever be properly entrusted with magisterial functions

8 Proceeding upon the lines indicated by the Government of India, the next question for examination is this—Are there any, and, if so, what considerations on the other side which must be set off against such abuses as have occurred, and which tell in favour of retaining the present system , and on which side does the balance of advantage lie? The question thus framed postulates, I am to observe, the existence of a practicable scheme for reform which may be compared with the existing system No scheme of this nature, applicable to the conditions of the Madras Presidency has, as far as this Government is aware, ever been put forward by the supporters of demand for reform How far the proposals of Mr R C Dutt for the separation of magisterial and executive functions in the Bengal Presidency, by redistributing, and slightly increasing, the existing staff, are capable of practical application in that presidency, His Excellency the Governor in Council is not in a position to say as far as the Madras Presidency is concerned he has no hesitation in rejecting them, not only as impracticable without an addition to the establishment far in excess of anything contemplated by Mr. Dutt, but also as likely to endanger the maintenance of peace and the general administration As the Government of India is aware divisional charges in this Presidency are already inconveniently large the effect of Mr Dutt's proposals would be, by halving the number of officers engaged on executive and judicial work respectively, to double the extent of each officer's local jurisdiction The area of the new divisions thus created would be so extensive that while both executive and magisterial officers would find it physically impossible to give constant supervision by means of personal inspection, the inhabitants of outlying towns and villages, having business to conduct in the offices of the division, would be seriously inconvenienced by the greatly increased distances which they would have to traverse

9. These two objections alone would, this Government considers, be fatal to the introduction of Mr. Dutt's scheme in this Presidency The only possible means of carrying out the separation of magisterial and executive functions which he proposes would be by doubling the district staff, and establishing separate magisterial and executive officers in each

charge now occupied by an officer with conjoint powers Assuming that the Government of India were willing to incur the expense involved in such an addition to the existing staff, the Governor in Council is of opinion that the increased expenditure would be more wisely applied in reducing the excessive size of the divisions placed in the charge of a single officer, rather than in doubling the size of the divisions and depriving half the officers of their magisterial powers In explanation of the position which His Excellency the Governor in Council thus takes in the matter, I am to refer to one important feature in Mr Dutt's scheme which can hardly fail to condemn it in the eyes of those experienced in practical administration in India Mr Dutt, in apportioning the work of a district between the separated executive and judicial staff, is silent as to where he would assign the responsibility for the maintenance of the peace This responsibility must necessarily be associated with the possession of the powers for the prevention of crime and the preservation of the peace provided in chapters VIII—XII of the Criminal Procedure Code Looking to the fact that several of the instances of abuse of the combined functions put forward by the memorialists are intended to illustrate the danger of entrusting the exercise of powers under these chapters to officers performing executive duties, it is clear that Mr Dutt does not contemplate their remaining in the hands of the Collector, and shorn of these powers it is impossible that the Collector should be held in any way responsible for the peace of his district It can hardly be supposed, as assumed by Mr Justice Benson in his minute attached to this letter, that the memorialists propose to leave the exercise of the preventive powers under the Criminal Procedure Code entirely in the hands of the police the dangers of such an arrangement are too obvious to need enumeration It seems plain, therefore that what is intended is that the prevention of crime through the medium of the security sections of the Criminal Procedure Code, the preservation of the peace by means of orders under chapter XII of the Code, and the suppression of riots by force should in future be the care of the Judge and his judicial assistants Apart from the fact that the performance of these duties would involve the judicial staff in a connection with the police which offends against the canons of judicial propriety laid down by the memorialists themselves, the adoption of such a system would, in the opinion of this Government, be attended by the gravest objections Experience shows that even in the most tranquil of Indian districts there may be sudden outbreaks of disorder, requiring prompt and vigorous magisterial action That the Judge should hasten from the bench to take this action is obviously impossible, and is probably not intended by the memorialists equally impossible is it that the suppression of a dangerous disturbance should await an order delivered *ex cathedra* by the Judge, and arrived at after the leisurely methods appropriate to ordinary judicial enquiries The adoption of Mr Dutt's scheme would thus seriously endanger one of the essentials of British administration in India, namely, the preservation of order That such a result would be contemplated with equanimity by the distinguished gentlemen who have signed the memorial His Excellency the Governor in Council cannot suppose the fact that this grave defect in the scheme to which they have lent their support has escaped their notice strengthens the conclusion, already suggested by a perusal of the list of the signatories, that the demand for reform is based mainly on experience gained in the Presidency towns, and not on a large acquaintance with the actual conditions under which the peace of the country is maintained

10 In demanding that the duty of supervising the work of the subordinate magistracy should be taken out of the hands of the district and divisional officer and vested in the Judge, the memorialists appear to this Government not only to proceed upon an entire misapprehension of the methods in which that supervision is now exercised, but also to shut their eyes to the conditions which render such supervision necessary The control of the district or divisional officer is exercised in this Presidency not, as the memorialists would have it believed, by means of directions to the subordinate magistrates as to the manner in which particular cases should be disposed of, but by maintaining a close watch over the work of each subordinate, by promptly pointing out such errors of law or of judgment as may occur in order to prevent their repetition, by frequent personal inspections, and, occasionally, by such general advice—as for instance in regard to the nature of the penalties to be imposed for some special class of crime—as his superior training and experience enable him to offer That the judicial independence of the magistracy, or the proper exercise of their discretion, is in any way fettered by control of this nature, His Excellency the Governor in Council unhesitatingly denies on the other hand, the intimate personal acquaintance not only with the work but also with the character of his subordinates which the district or divisional officer acquires, is invaluable as a check upon corruption That this supervision could be adequately exercised by a stationary Judge, to whom personal inspections would be seldom possible, and whose knowledge of his subordinates would be chiefly obtained from a perusal of the records of their work, is rightly held to be impossible not only by every executive officer but also by many judicial officers of experience The change advocated by the memorialists would thus, so far from remedying any existing evil, involve the sacrifice of the valuable protection against misconduct and abuse of magisterial powers which the present system affords

11 It is, however, in its effects upon the maintenance of order and the general security that the proposal to divest executive officers of all magisterial authority appears to this Government to be open to the gravest objections Reference has already been made to the absence in the memorial of any allusion to the manner in which, under the proposed scheme of separated executive and judicial functions, the important duty of preserving the peace and checking disturbances would be exercised, and it has been suggested that this omission is due

to want of knowledge on the part of the distinguished legal authorities who have supported the memorial of the real conditions of Indian administration Similar want of knowledge, however, obviously cannot exist in the case of Mr. Dutt, and it is accordingly not surprising to find that that gentleman's demand for the severance of judicial and executive powers is limited by the admission that in no less than seven districts in Bengal the separation is "not desirable" Mr Dutt's reasons for this view are not explained, but are sufficiently obvious and his conclusion serves in itself to refute the justice of the memorialists' demand for the "complete separation of all judicial and executive functions" in each province in India The fact is, as Mr Dutt's admission shows, that the question whether the Government can afford to weaken the hands of an already numerically weak executive in favour of the attainment of theoretical judicial impartiality, can only be decided with reference to the conditions prevailing Whether the memorialists' ideal—a system in which the judiciary and executive should be entirely distinct—constitutes even theoretical perfection in an oriental country where long tradition points to the concentration rather than the distribution of authority, need not be discussed The practical question to be considered is this, whether, looking to the actual conditions of the country, the time has come when the maintenance of a strong executive is no longer essential, and when the preservation of order and the stability of the Government may be safely entrusted to the instinctive good sense of the people themselves The experience of this Government answers this question with a decided negative The *Pax Britannica* is not, as the memorialists appear to hold, self-existent, but is maintained largely by the unremitting exertions of the handful of Europeans whom it is now proposed to deprive of their magisterial powers Even in this Presidency which has been longest under British rule and is one of the most orderly and peaceable in India, subterranean explosive forces from time to time produce sudden and startling events Within the last two years in the quiet district of Tinnevelly, where the pacifying influences of various missionary societies are more widely spread than anywhere else in India, one large section of the population rose against another, a town was sacked, villages were burnt, and men, women and children were murdered. The rising had to be put down by the district officers with the aid of military force, and a large body of police has been raised, and must for a considerable time be quartered in the disturbed area, to ensure order In another peaceful district a self-styled incarnated god, promising an earthly paradise and the overthrow of British rule, attracted thousands to his standard and commenced his reign by the murder of two of the police The Collector and District Magistrate aided by his executive officers only succeeded in capturing the impostor and dispersing his followers by the promptest action and at much cost of life Three years earlier the ordinarily tranquil districts of Madura and Coimbatore were the scene of grave disorder, caused by a popular rising against a formidable caste of hereditary thieves and watchmen. arson and other crime ensued and the powers of the executive were taxed to the utmost to restore order Again, the peace of the Malabar district has within the last decade been twice disturbed by fanatical outbreaks, both involving bloodshed Nearly five years have elapsed since the last outbreak in 1896, but experience shows that these disturbances are liable at any moment to recur, and in the present year it was found necessary that the permanent Collector and District Magistrate, who was about to proceed on furlough, should remain by the side of his successor until a critical time had passed, to be ready with his aid and advice if trouble arose.

12 But it is not only by such notorious instances as these that the necessity for the maintenance of a strong executive, armed with the fullest authority, is proved Ignorance, poverty, the influence of religious or caste prejudice, and even hereditary training all constitute an ever-present menace to the maintenance of order among the lower classes of the population How constant is the danger to which the public security is thus exposed, and how unremitting the efforts necessary for the preservation of tranquillity is well illustrated by the experience of one of the officers whose opinions are enclosed with this letter Mr Bradley, as the result of 5½ years' work as Collector and District Magistrate, is able to point to no less than four occasions upon which serious danger to the peace of the district of which he held charge was only averted by the promptest use of his combined executive and magisterial authority Mr Bradley's experience is not unique, and many officers whose views are not on record could bear similar witness to the conditions under which the work of administration is carried on

13 Apart, however, from what may be regarded as the difficulties inevitably attending the maintenance of order in this country, there is another circumstance which renders it, in the opinion of this Government, a wise precaution to maintain the authority and influence of the district officers unimpaired Mr LeFanu has, in his minute appended to this letter, alluded to the danger to the public security foreshadowed by the constant growth of political agitation, and its extension even to rural tracts The recent abortive attempt in the Bombay Presidency to combine against the payment of land revenue is not without significance When it is remembered that almost the whole of the land revenue of Madras, between 500 and 600 lakhs of rupees, is collected for Government by village headmen whose average pay is about Rs 5 per month, and is carried to the treasuries by village messengers whose pay is ordinarily not more than Rs 4 per month, it is obvious that movements similar to that which has taken place in Bombay would need the closest attention That there is any immediate likelihood in this Presidency of such an agitation, His Excellency the Governor in Council would be loath to think nevertheless, the possibility that, as political associations of various kinds extend and ramify, the efforts of agitators may be turned in this direction cannot be disregarded

14. In expressing his conviction that the proposed separation of executive and magisterial authority is incompatible with a proper regard for the maintenance of the public

security, His Excellency the Governor in Council is influenced not only by the almost universal opinion of officers of experience in the general administration, but also by actual observation of the results of the measure of separation which has already been effected in this Presidency It is now some ten years since this Government, in connection with a scheme for improving the revenue administration, by relieving Tahsildars of their magisterial work, obtained the sanction of the Secretary of State to the establishment of a large number of stationary Sub-Magistrates to whom has been entrusted the bulk of the magisterial work of the Presidency, and whose duties are entirely judicial The new arrangement, which was brought into force in October 1892, resulted in the establishment of stationary Sub-Magistrates in 108 out of the 155 taluks in Madras For some years after the introduction of the new scheme no occasion arose for reviewing the effects upon the general administration of the radical change thus introduced In 1899, however, in connection with the serious disturbances which occurred in the Tinnevelly district in that year, the attention of Government was attracted by the complete failure of the district authorities to foresee the trouble which was brewing, or even to recognize the gravity of the situation after the disturbances had actually broken out His Excellency the Governor in Council was led to suspect that, apart from any personal shortcomings of the district staff, the failure to discern the widespread unrest which prevailed in the district was, at any rate in some degree, attributable to the diminution, and practical withdrawal of the responsibility for maintaining the peace of his taluk formerly imposed upon the Tahsildar This suspicion was confirmed by the opinion expressed by Mr Hammick, the Special Commissioner appointed to enquire into the Tinnevelly disturbances, in paragraph 77 of his report, a copy of which was forwarded to the Government of India with my letter no 2018, dated 12th December 1899 Mr Hammick observed that the absence of warning of the threatened outbreak was attributable partly to the defects of the present system, under which neither the Sub-Magistrate nor the Tahsildar can be in complete touch with the progress of affairs in the taluk, the former, because, as a stationary officer, his acquaintance with affairs around him is confined to knowledge acquired from the cases which he tries and from police reports, the latter, because the severance of his connection with the police and the weakening of the control which as Taluk Magistrate he formerly exercised over the Village Magistrates leave him in practical ignorance of the state of crime in his taluk Impressed by the seriousness of the evil thus disclosed His Excellency the Governor in Council caused inquiries to be made, with a view to ascertain whether the introdution of the stationary Sub-Magistrates' scheme had in other districts been attended by similar effects The result of these enquiries was to elicit the practically unanimous reply, that while the general standard of efficiency of the subordinate judicial tribunals has doubtless been improved by the establishment of a separate class of Magistrates, whose time is wholly devoted to judicial work, the change of system has probably exercised a prejudical effect on the detection of crime, and has certainly diminished the safeguards which formerly contributed to the general maintenance of order Experience shows that the tendency among the stationary Sub-Magistrates is to withdraw themselves from all connection with the police,—to assume, in fact, the position of "Sessions Judges in miniature,"—with the result that the police are now left much more to themselves during their investigations than was formerly the case For a fuller discussion of the effects which have followed the practial withdiawal of the subordinate magistracy from control over the police, I am to refer to paragraphs 14 to 18 of the opinion recorded by Mr Hammick, the permanent Inspector-General of Police in this Presidency, which is enclosed with this letter

15 But it is in regard to the prevention of crime and the maintenance generally of the authority of Government that the division of functions has been attended by the most unfortunate results The difficulties which the district authorites experience under the present system in watching and controlling the tendency to crime and disorder among the people under their charge, are borne witness to not only by every executive officer, but by others the impartiality of whose conclusions cannot be impugned. Mr. Justice Benson, the Judge of the High Court, upon whom fell chiefly the duty of hearing the appeals presented in connection with the Tinnevelly disturbances, has stated his opinion that the riots might have been prevented, or at least minimised, had not the superior Magistrates been hampered by the change of system which has made them dependent for their information upon stationary Sub-Magistrates, divorced from all concern with the general administration The Inspector-General of Registration, the Hon'ble P Rajaratna Mudaliyar, as the result of an intimate acquaintance with the conditions of native society, both official and non-official, has recorded a similar opinion He points out that while the preservation of order and the maintenance of the authority of Government cannot be adequately performed by the stationary Sub-Magistrate, the withdrawal of magisterial powers from the Tahsildar has so diminished the influence of that officer that it is impossible for him to turn to practical use the knowledge of affairs in his taluk which he acquires during his constant tours In his opinion what is required is that the Tahsildar, who is now regarded as a mere "Head Revenue Inspector," should be replaced in his position as the responsible head of the taluk, and should be vested with the full authority which is necessary for the discharge of his public duties

16 The consensus of opinion thus expressed had, at the time when your letter no 521, dated 31st of March 1900, was received, led His Excellency the Governor in Council to take into consideration the question of restoring to Tahsildars so much of their magisterial authority as would render it possible to impose upon them full responsibility for the maintenance of order in their taluks In view of the wider discussion set on foot by the memorial to the Secretary of State, the Government, while convinced that some alteration of the existing system is

inevitable, has deemed it best to defer its decision for the present, merely directing that in the Tinnevelly district, where the necessity for better provision for the maintenance of peace is urgent, steps should be taken to utilise to the fullest extent the powers for the prevention of crime which the Tahsildars possess

17 From the results which have thus followed the separation of executive and magisterial functions in the lower grades of the service, it is possible to gauge with some accuracy the probable effects of the complete separation for which the memorialists contend Greater precision of law and of technical procedure would doubtless result from confining the trial of cases to the hands of officers whose whole time would be spent in judicial work The statistics of the past five years do not, however, disclose any urgent necessity for improvement in this direction, on the contrary, they show that, judged by the appeal test, the decisions of District and Divisional Magistrates are hardly more liable to error than those of the Sessions Judges On the other hand, the weakening of control over the police, the withdrawal of the magistracy from all interest in the detection of grave crime, and the general loss of touch between officials and the people—drawbacks sufficiently serious when they affect merely the internal organization of a taluk—would, if extended to the larger sphere of the district, constitute a serious drawback to good administration The fear that the diminution of the powers of executive officers will affect their general authority is scouted by the memorialists as imaginary nevertheless, experience in the Presidency shows it to be well-founded More than one officer, in commenting upon the results of the introduction of the stationary Sub-Magistrates, scheme, has pointed to the difficulty which Tahsildars now experience in enforcing orders issued by them in an executive capacity, in connection with such matters as the adoption of sanitary precautions on the occasion of large festivals or on the outbreak of epidemics That the deposition of the Collector-District Magistrate from his present place as the executive and magisterial head of the district would be followed by similar loss of power, but on a far larger and more serious scale, cannot be doubted nor can it be denied that such a weakening of authority—of "prestige," to use the somewhat vague term employed by the memorialists—would add enormously to the difficulty of the task now undertaken in this Presidency, of carrying on the general government of nearly forty millions of people by means of a superior staff consisting only of some 160 covenanted officers and 100 Deputy Collector-Magistrates

18 But, it may be asked, if the emphatic views thus expressed are well founded, how does it come about that the demand for the separation of executive and judicial functions is supported not only by a considerable body of native opinion, but also by the lawyers of distinction who have subscribed to the memorial? In regard to local opinion the explanation appears to this Government to be simple The Congress party, under whose auspices the movement for separation is mainly conducted, consists largely of vakils, to whom the idea of effecting a complete severance of the judiciary from the executive staff is attractive not only on theoretical grounds but also because the employment of a large number of additional Magistrates and the establishment of new stationary courts would open out fresh fields of employment to a profession already overstocked, and would thus produce material advantage to themselves and their class Others, in whose case no such personal considerations exist, are doubtless prompted by a desire to bring Indian methods of administration more closely into line with those prevailing in England They ignore, however, the fact that the Indian district and its administration have really no counterpart in England, the nearest analogy to it being found in the French 'department' and they fail to see that to comply with their demand would be to render the Indian system even more 'unenglish' than it is at present, and to place the district officer in a position almost exactly similar to that occupied by the French 'Préfet' On the other hand, the support lent to the movement not only by the high legal authorities who have signed the memorial, but also by some of the Judges of the local High Court, is not unnatural Their experience is mainly confined to the Presidency towns, and embraces little or no knowledge of the actual conditions prevailing in the mofussil It is, therefore, not a matter of surprise that they ignore the need for a strong executive, and fail to realise the important principle that in proportion as it is necessary that the executive should be strong, so is it necessary that it should be invested with the power of repression by judicial methods as apart from brute force That the High Courts themselves, with all their dependent judiciary and legal paraphernalia, the revenue of the country, and even the maintenance of British rule itself, depend upon the constant exertions, supervision and control, of a scanty body of civil officers, who are scattered throughout a great country, and who to perform their varied duties with efficiency must be invested with varied powers, is probably realised neither by Judges or ex-Judges of the High Courts, nor by any one else who is not in touch with the actual executive Government of the country

19 Finally, with reference to paragraph 5 of your letter under reply, I am to state that, as has already been mentioned in paragraph 2 of this letter, only one case has during the course of the last five years come to the notice of the Government or of the High Court in which the present system of combined functions can be held to have led to the introduction of executive considerations into the disposal of a judicial inquiry The nature of the case in question, which is alluded to by Mr Justice Shephard and Mr Justice Benson in their minutes attached, is sufficiently explained by the appellate judgment of the High Court printed on page 3 of the enclosure to this letter That the accused in this case was subjected to inconvenience and hardship by the introduction into a simple judicial inquiry of a general discussion as to the manner in which a large distillery was conducted, cannot be denied, and the failure of the Collector and District Magistrate to take notice of the impropriety committed by the Sub-Magistrate was undoubtedly open to adverse comment The matter did not, I am to observe, escape the attention of

Government at the time The explanation of the District Magistrate was called for and considered, with the result that Government found itself obliged to concur in the strictures passed by the High Court The fact that a judicial inquiry, connected with the case in question, was then pending, and remained for a considerable period *sub judice,* alone prevented Government from endorsing in a formal order the censure already passed by the High Court The circumstances of the case, nevertheless, appear to His Excellency the Governor in Council to lend little support to the memorialists' contention They point not to any deliberate intention on the part of the district officer to subordinate the administration of justice to the interests of an executive department, but rather to a personal error of judgment which any system might admit The incident no more warrants a general condemnation of the existing methods of administration than would the judicial errors mentioned by Mr LeFanu,* supposing, for the sake of argument, that his view of those cases is correct, warrant a condemnation of or a radical change in, the present judicial system

* Page 27 of the enclosure to this letter

S. G P I, Delhi—No 258 H. D.—12 3-13.—

Appendices XII and XIII.

MINUTES BY THE MEMBERS OF THE BOARD OF REVENUE.

Minute by the First Member of the Board of Revenue (The Hon'ble Mr J THOMSON)

The existing grievance is declared by the memorialists to be the combination of judicial and executive functions in one official The judicial functions in view are those of the Magistrate, the executive those of the policeman or of the public prosecutor, the official who at present unites them and against whom the attack is directed is the District Magistrate The remedy proposed is a full and complete separation. " So long as Collector-Magistrates have themselves the power to try or to delegate to subordinates within their control cases as to which they have taken action or received information in (their) executive capacity, the administration of justice in India is not likely to command complete confidence and respect "

2 Eight reasons are assigned for the doctrine. The first means that the same person should not be prosecutor and Judge, the second that the Judicial officer must be without all knowledge save what comes to him in court, while the District Magistrate must have and hear much extraneous thereto; the third, fourth, fifth and sixth concern the want of time with the District Magistrate for Judicial work, the consequent neglect of it, the bias in favour of his own views, measures or opinions which operate unjustly against those adversely affected, the seventh the necessity that courts should be stationary, and the eighth maintains as a general thesis, that, in fact, the people suffer under the present system, and the tribunals suffer in esteem even when miscarriages of justice do not result

The whole is enforced with the declaration that judicial work is expert work and requires special training.

3 The objections the memorialists suggest to their proposals are that the existing system works well in fact and is not responsible for its defects, that it is a necessity for the due maintenance of authority, and that the substitute proposed would be expensive

4 Item (*ii*) in Appendix A conveys the following impressions.—

(*a*) The District Magistrate apportions to his subordinate magistracy all cases arising in his district

(*b*) Government directly and through its subordinate executive attempts to unduly influence or to interfere with Judges and Magistrates.

(*c*) The District Subordinate Magistracy are liable to direct orders as to dealing with particular cases and cannot afford to be independent in judgment

(*d*) Even the District Judges are liable to harassment by Government if their judgments and proceedings do not meet with the approval of the District Magistrate or his superiors

5 His Excellency the Governor-General in Council desires to be informed—

(1) How far the combination of executive and judicial functions in the same hands actually leads to abuse,

(2) Whether there is any particular evil to be remedied,

(3) If so, of what nature and degree

6. If the cases of misconduct set forth in the memorandum are facts and common products of the system at work in Bengal, and if the District Magistrate there uses his subordinates to register his judgments and does not leave them free to arrive at their own, then unquestionably a remedy is called for But on the consideration that I can give the cases they seem to evidence faults of the individual officer rather than of the system and to require treatment accordingly The latest—the Saran case of the current year—arose by men being allowed to discharge offices which neither years, nor experience, nor perhaps natural parts, fitted them to fill Apparently, too, in that case the sense of justice was as defective in the district judicial as in the executive chief officer Still, if in Bengal the whole magisterial work of a district is concentrated in the District Magistrate and is apportioned and directed by him individually instead of each Magistrate of whatever class having his assigned local jurisdiction wherein he is guided by the laws' provisions as to powers and procedure, there seems little room for question that the District Magistrate's initiative is much too considerable, that there must be a tendency towards preconception in cases, and that present arrangements should be altered so as to correspond with Madras practice where the District Magistrate knows of little save the grave crime of his district till made aware of it by the copy of the calendar submitted by the Lower Court in each case

7 On the first matter of reference by the Government of India I would say that the combination as operative in this Presidency is neither abused nor leads to abuse. In this connection one can cite only his own experience and observation. As a Subordinate Magistrate I never in my recollection received any order, hints or direction fettering my individual judgment; on the contrary when in perplexity and seeking counsel the invariable instruction was that I must judge for myself As a Divisional and District Magistrate I did not find that the control and direction which the law imposed on me involved the slightest interference with the freedom of the Subordinate's judgment. Errors, wilful or otherwise, in procedure, in the estimation of evidence and in finding, fell to be corrected as they occurred and when

discovered and such rules of general conduct as would govern any court, *e.g.*, to punish prevalent cattle-lifting heavily, to treat matters newly made offences lightly, would issue when they seemed required. Of what other use is authority, and do these memorialists imagine that a Magistrate is born and not made? A perfectly clear line divides such instruction from hints, orders or directions that do not leave the Magistrate a free agent for the purposes for which he was appointed a Magistrate, and I distinctly assert for myself and claim it for the Madras Service as a body that the allegations made by these memorialists of intimidation of, undue influence over, direct orders to, fettering free judgment, the subordinate magistracy, so far as this presidency is concerned, are absolutely without foundation And I will supplement the statement by declaring that the Subordinate Magistracy, taken as a body, are characterized by no obsequiousness nor by any desire to pervert justice with any idea that they would thereby commend themselves to their superiors They are and are meant to be thoroughly independent Judges

8 Misconduct of the nature under consideration by executive officers other than the District Magistrate is a secondary matter in these papers, but if the case holds as against the District Magistrate it must hold against every officer similarly empowered There is therefore no escape from a thorough clearage and separation if the indictment is held proved. It cannot be asserted that all Tahsildar-Magistrates and Deputy Collector-Magistrates are faultless in the interaction of their dual powers, but any such abuses are certainly far rarer now than they were at one time and I believe rare altogether when the total work transacted is regarded. All such faults or shortcomings are not in the system but in the individual, and the superior authority exists to check them With open cutcheries, a free press and vakils, petition-writers and the schoolmaster everywhere no peccant officer can cover his misdeeds for long I am concerned to say only that abuse of the double powers in the same officer is not a feature of the administration of justice in the lower magisterial courts in South India any more than in the higher

9 The institution of Stationary Sub-Magistrate Courts in this Presidency was intended by their proposer to set the Tahsildars free to attend to their proper revenue work and to relegate the Taluk Seristadar Magistrate to his proper account duties The Stationary Magistrate was intended for revenue as well as magisterial work when the former could have time given it. Government in accepting the proposal described the separation of duties as very widely demanded on good grounds The allegations of the time reflecting on the Tahsildar-Magistrate were that parties were unnecessarily dragged round the Tahsildar's charge while he went on circuit and accordingly abandoned their causes and enabled the Sub-Magistrate to clear his file by dismissing them for default of appearance The result has been, practically, a separation of judicial and executive functions in the Taluks where a Stationary Sub-Magistrate has been appointed, for they very seldom do any revenue work and the Tahsildar is debarred from doing any magisterial

10. At the time I did not regard this separation as either necessary or expedient, what was required was more workers and smaller charges, not a division of the total work according to its kind My opinion was that the administration of justice would not be advanced by placing men within four walls and setting them to "weigh" evidence, for however well it may sound to proclaim that a Judge must know nothing except what is transacted according to law inside his court-house that method of arriving at truth so as to shield the innocent and punish the guilty does not commend itself to the law-abiding of this country, nor, I think, to many of those charged with the maintenance of peace and order The upright Magistrate who knows the people under his charge, their factions and peculiarities, the evil and well disposed among them, will not be likely to have his court converted into a machine and himself made a tool of to cause annoyance or disgrace to the enemies of complainants The outside knowledge to be gained by a Revenue officer moving among his people is of extreme assistance in assessing the real value of evidence recorded on paper—of which there seldom is any lack—and the prime Magistrate is the one who *knows* which side of a story deserves credence. The one who does not know is placed as Burridan's ass and when he chooses which he will stand by is as likely to be wrong as right

11 Such opinions are heresy to the lawyer and the vakil The Stationary Magistrates' Courts are a satisfaction and convenience to those whose business is "to win" their "cases." For petty cases, where there is no room for two opinions, nothing is to be said against such courts, rather the contrary In assuming their actual worth however the occasions on which they are put to a real test fall to be considered, I have not heard any experienced native officer commend them The experience and knowledge of the people and their affairs, gained by practical—executive—work among them, will fittingly supplement what parties and vakils choose to put on the judicial record and will prevent many false cases from being filed at all. I have therefore never ceased to consider that this separation of functions that was made was a mistake, and committed at the end of the scale least able to sustain it The inconveniences of a circuit court, which could not always be certain of fulfilling its circuit engagements, were no doubt considerable, but could have been much decreased if more foresight and consideration had been exercised in the planning of work and the ranges reduced in area.

12 The men that became Stationary Magistrates and were not already marked down for promotion by the Collector too frequently found themselves stranded in their courts. Some are still there after eight years The longer they are severed from revenue work the more difficult it is for them to return to it; the only promotion for them in the district is to a Tahsil. If the division of duties becomes absolute, there seems nothing for these Magistrates

to look forward to save to be Deputy Magistrates and the number of such would be very small in comparison They would be useless as District Munsifs without any civil court experience It could hardly be expected therefore that men, both able and honest, would care to be made Sub-Magistrates If they could still look to the District Collector for promotion, and if subserviency to that officer is a feature of the present condition of things—as it is not—the proposed change of system would do nothing to remedy it

13 Further it would be utterly impossible to place the District Judge in charge of the magisterial work of the district, he could not attend to both it and his civil work, nor could he from a fixed station adequately supervise it and his subordinates If he becomes a peripatetic officer, he is in worse case than the District Collector, for his civil and sessions work must suffer The tracking down and punishment of crime are not open to the leisurely methods of disposal that characterize civil justice And if the District Superintendent of Police is to be the District Judge's instrument for the prevention and detection of crime wherein will the Judge differ from the Magistrate? If he is to be a less efficient head of the magistracy, why should the present head give place to him? Who is to be responsible when riots break out or disturbing elements are seething? As things stand at present the District Magistrates' uses and functions are clear and readily available when and as occasion arises, he is as much subordinate to the Sessions Judge as is necessary to secure that he acts within the law while discharging the duties confided to him, given that he is fit personally to hold the office by character, ability, temperament and experience, it is difficult to see what improvement in administration is called for or feasible The whole matter, viewed on these papers or otherwise, becomes a question of the fitness of the individual officer I can only say that my experience points to no evil of any nature or degree that requires a remedy, and I do not see any possible change that could be devised that would not be a change for the worse

14 It is not strange that men of the highest judicial rank and talent whose business it is to discover and correct aberrations of the lower courts, should, when a question of this sort is mooted, let their minds dwell on the shortcomings or positive misconduct they have had to remedy The total of good work done, and the natural or necessary percentage of bad there must be in every system, are then apt to be forgotten I venture to think that a contrasting survey of the magisterial files of to-day and of twenty years ago would afford conclusive ground for holding that the desire to do justice and the training to effect it have conspicuously increased Conversion of the magistracy into a purely judicial body will no doubt reduce the necessity for revision by the higher courts, will it bring more substantial justice therewith?

15 Prestige and authority ought to have respect in proportion as they deserve it I confess that I regard the whole of this clamour over the separation of judicial and executive functions as only part of the programme to reduce existing authority, and the authority of the European in chief, in order to throw more power and control into the hands of the class that live by the law and litigation, and I think that the country itself has no notion of any ailment nor any desire to be more vakil-ridden that it now is

P S—The observations of the Hon'ble Mr Nicholson on the undue influence brought to bear on the magistracy by departments interested in adding to the revenue by vigorous application of departmental laws, if in undue prominence in the present connection, indicate the readily available remedy The sympathies of the sub-magistracy are frequently with breakers of such laws as govern Salt and Forests, and lenity becomes an injury to both the individual and the State In such case it becomes the duty of officers of the departments concerned to endeavour to have the law respected But no District Magistrate, worthy of his office, will allow the judicial independence of subordinates to be attacked or their judgments contested without adequate grounds I see such grounds from time to time

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Minute by the Second Member of the Board of Revenue (The Hon'ble Mr W J H LEFANU)

The minute of the First Member of the Board, the Hon'ble Mr. J Thomson, exactly expresses my opinions, so far as it goes

As to the two questions formulated by His Excellency the Governor-General in Council I would state that—

Firstly, in my personal experience of thirty-five years' service, I can recall but a single instance, in this Presidency in which the "combination of executive and judicial functions in the same hands has actually led to any abuse", nor do I think that there is "any practical evil, of any nature or degree, to be remedied"

The single instance to which I refer was that of the notorious Salem riot cases, and no change in the law could prevent a repetition of that scandal No law can provide against the poisoning of the fountain of justice from its very source to the sea, and I cannot conceive the possibility of a recurrence of the extraordinary combination of forces of every rank, which furnished the British name in India with that indelible stain

I might add that I cannot remember a single case of the kind referred to in any part of India outside the limits of the Bengal Presidency

Secondly, as to "considerations on the other side which must be set off against such abuses as may have occurred, and which tell in favour of retaining the present system," I would

quote, *fas est ab hoste doceri*, the words of the late Mr Manomohan Ghose, who was the guiding spirit of the present agitation —

"Justice was never better administered, and life and property were never more secure, in the history of India, than they are at the present moment Even the masses of the people in Bengal, with whom I came daily in contact, have learnt to appreciate the blessings of a pure administration of justice"

This opinion of a Bengali vakil, who was the leader of the native bar at Calcutta, is endorsed by a Bombay vakil of such eminence as the late Mr Maneksha J Taleyar Khan, who "begged to add his testimony to that of the great native lawyer Mr Manomohan Ghose, that there never was a time, during the last three or four centuries, when justice was so well administered in India, and when the people were so well satisfied with it They were dissatisfied about other matters, with the executive for instance, but, so far as the judiciary were concerned, they were absolutely satisfied both with the native, and the higher European, Judges who supervised the natives, and this was one of the greatest claims of England to the gratitude of Indians"

This was also the opinion of Sir Sayyid Ahmad, who held that, "of all the innumerable blessings of the British rule, the one my countrymen esteem most is justice"

A system which has called forth such encomia from native gentlemen of "light and leading" can hardly be consistent with "serious mischief", "gravest stigmas", "incalculable oppressions" and "many judicial scandals" to quote the hysterics of the memorial

The Government of India ask, between the existing system and the proposed modifications "on which side the balance of advantage lies" I have no hesitation in plumping for the present system, which should not be meddled with unless Government wish to weaken the hold of law and order on the Indian soil, to lower the standard of administration, to hand over the country to the fanatic and agitator, and to pave the way for another power to reap where we have sown

I must admit that the indictment contained in Mr Manomohan Ghose s memorandum gives cause for reflection Even after making all deductions, which seem justified in the light of Sir Charles Elliott's examination of these cases, there remains a residuum in which bias, want of discretion, and what is commonly known as "Bahadurism" cannot be explained away, I do not think that any of these cases would possibly have occurred in this Presidency It is, I think, an established fact that education has made more progress in Madras than elsewhere In no part of India has the English language obtained such currency There are trained vakils everywhere, the telegraph and the railway are generally accessible, every act is watched with jealous, and often malignant, eyes, the right of appeal and transfer is so generally known and used, Government acts so promptly on any complaint of oppression, and calls for explanation even when an alleged abuse is first challenged either in the English or the vernacular press, there is such a general absence of Bahadurism, officials are so generally accessible, and the spirit of the public service is so good, that I cannot conceive any abuse of power, such as is contemplated in the memorandum, progressing from conception to execution without being at once checked by the veto of superior authority

While conceding that there have been instances of an abuse or straining of power, as pointed out elsewhere, I would first ask what percentage these cases bear to the millions of cases decided, in the last thirty-five years, with justice and decency If, as I think, the percentage would be represented by a very remote decimal point, then I would say that these aberrations are due to human weakness—an element which would be found in any, the most utopian, reorganization, that they are not the results of the existing system, and are, in fact, due to a personal equation, which can never be eliminated.

I would not for a moment be understood to argue, or admit, that my brother civilians in Bengal enjoy a monopoly of indiscretion *A priori* their work should be a mirror for the rest of India, as Bengal has generally received a larger share, judged by competition results, of the best abilities of the services than has been vouchsafed to the sister Presidencies It may be worthwhile to consider whether there are any special grounds which have determined the precipitation of disturbing elements in the tracts favoured by the activity of the late Mr Manomohan Ghose

I think it possible that a prestige, which has always attached to the Bengal service, may have had somewhat intoxicating effects on certain weaker vessels On the rare and privileged occasions on which the Ismaels happen to foregather with the Jacobs of the service, the former cannot but be sensible, occasionally, that they are not of the *pâté tendre* of which the latter are composed In some small degree this feeling of superiority may have had a tendency to dictatorism, to an impatience of contradiction, and, certain manifestations of self-will, which have occasionally thrown discredit on a branch of the service which, as a whole, is no doubt free from those faults, and has always furnished members ready to see that justice was done

There is, however, another matter on which I do not speak from actual knowledge, but regarding which I believe that I am more or less correct, and which has, perhaps, given room to the enemy to blaspheme.

I may, *en passant*, observe that here in Madras, and, I think, in Bombay, the authority of the District Magistrate over the police is a quantity so small, so almost impalpable, that it may be neglected The Madras Police had the good fortune to be organized, after the Mutiny, by the late Sir William Robinson. It was then, and unfortunately is no longer, officered exclusively, as far as I can recollect, from the commissioned ranks of the army It had its full

chain of officers reaching up from the districts, through the Deputy Inspector-General, to the Inspector-General, and the whole force was permeated by an *esprit de corps*, a spirit of high traditions and high aims, which enabled it, very much, to stand alone, and there was no particular room or need, for the District Magistrate to interfere with their conduct of business nor, having regard to the spirit which linked the force together, and the imperiousness of its civilian chief would any such tendency to meddle have been productive of good results The police were expected to enforce law and orders, and, being generally very capable of doing it, were very much left alone, as a force, to do their own work, the two services worked together, in loyal co-operation, side by side, and hand in hand, rather than in subjection, the one to the other On the the other hand, in Bengal, and, if I mistake not, elsewhere in Northern India, whatever may have been the original organization of the police force, the District and Joint Magistrates were held responsible for the state of crime in their districts, and thus there was a sort of encroachment on what are pure police functions, a sort of overlapping of the work of two departments, which may have led the public to associate the Magistrate with the police in a way, and to an extent, which is unknown in Madras In the latter Presidency, the Magistracy have their duties to perform in the maintenance of order, though the tendency, especially in regard to processions, is to leave the police to attend to such matters, and hold them responsible for the way in which they do it The Magistrate does not ordinarily interfere in petty details of this kind, but, whenever any serious disturbance is apprehended, he steps forward, and assumes the responsibility, and the police then act under his orders As regards, however, the state of crime in their districts, except when such takes the form of public disturbances, *fituris*, Moplah outbreaks, etc, the magistracy of all ranks in this Presidency are not held responsible, and the police are expected to perform their proper duties unaided No doubt the police report in certain matters to the magistracy, the Superintendent may consult with the District Magistrate, and the latter is kept aware of everything of importance which occurs, but the responsibility still generally rests with the police, and the Magistrate does not appear prominently taking any part in, or exercising any overt control, over the police force I think if my surmise as to the state of things in Bengal is correct, that, according to the lights we have in this Presidency, it would be better if the Bengal practice were brought more into conformity with that of Madras Even this, however, I say with some hesitation, as there may be circumstances, unknown to me, which require the adoption of a different system in Bengal

On the other hand, I am not altogether sure that the District Magistrates hold his proper place in this Presidency I am not sure that it would not be better if he had more authority over the police than he has, and if it were more clearly enforced in practice, as it is laid down in theory, that the Superintendent of Police is the assistant of the District Magistrate with some strong men this is the case, and the police take their proper position but, with weaker men as District Magistrates, the Superintendent is apt to rebel against control, and to look to his police chief to support him in ignoring the District Magistrate There has been some slight improvement in this matter in later years, in so far as the journals of the Police Superintendents, which go to the Inspector-General through, and with the remarks of, the District Magistrate, return through that officer with the Inspector-General's remarks or orders Formerly their diaries returned to the Superintendent of Police from the Inspector-General direct, and the District Magistrate had no means of knowing what attention, if any, had been given to his suggestions Naturally, what he could not demand as a right he would not ask as favour, and, unless prepared to enter on an acrimonious correspondence, in which he could not be sure of support from Government, the District Magistrate would let the matter drop.

I will quote a case of the kind, which will show how powerless the District Magistrate in Madras is, or was

During the trial—before Mr Bosanquet, now employed in the Political Department under the Government of India—of the famous case in which the Mahant of Tirupati was accused of making away with £20,000 worth of gold coins belonging to the temple, the complaint against him had been drawn up, and was being prosecuted by, the leader of the local bar, now the Hon'ble Sir Subrahmanya Aiyar, Justice of the High Court It may be supposed that the most careful enquiries had been made before this charge was launched, known as it was that the Mahant enjoyed the very special friendship of His Excellency Lord Connemara, the Governor of Madras, and of Mr J D. Rees, his Private Secretary The Mahant had large pecuniary resources at his disposal, and there is no doubt that these were unscrupulously used I was then District Magistrate of North Arcot, and the Superintendent of Police sent his diaries through me to the Inspector-General I was supposed to know what the police were doing, and it was the Superintendent's duty, in a case of such importance, especially as it was not a police case, but a private prosecution, to take no step without my knowledge Now, as to what happened, whatever my impressions may be, I do not know for a fact who initiated the step which was taken, whether the Superintendent, or one of his Inspectors, or some other underling I learned *from the public press*, that the Superintendent of Police had presented an occurrence report, in the middle of the trial, to Mr Bosanquet, representing that the criminals before him were not the real criminals, and that the case before him was not the true case, and that, if he would adjourn the case for a fortnight, the police would submit a charge sheet, and put the true criminals before him, *i e*, an entirely new case would be put forward in which, possibly, the Mahant would be eliminated altogether, or the case would be so shaped that it would fall against the Mahant, and some unimportant underlings, who would gladly

go to jail for a few hundred rupees, would be convicted Mr Bosanquet was a very young Magistrate, and acceded to this request

We have heard much—from Mr Manomohan Ghose—as to the interference of the District Magistrate with his subordinates What I did in the case was this I told Mr Bosanquet that he had a case before him, brought by responsible persons, that he could not throw this case aside and substitute an entirely different case for it, that it was his duty to dispose of this case, as he thought fit, on the evidence, and if, when it was over, the police chose to put another case up before him, he should dispose of that also according to law Meanwhile, I ordered him, without further delay, to resume the hearing of the Mahant's case, and dispose of it

The result was that the Mahant was committed to the sessions, and there convicted and sentenced to imprisonment, which he underwent I consider that it was absolutely necessary that the District Magistrate should have the power to interfere as I did, and no District Magistrate of less rank than the Collector-Magistrate would have ventured to interfere, having regard to the relations which existed between the Mahant and certain high placed personages

The action of the Superintendent of Police—whether his own or suggested by his subordinates—was a public scandal Without a word to the District Magistrate, and without even alluding to the matter in his weekly diary, the Superintendent of Police took a step which, if successful, would have led to the acquittal of the Mahant, and the breakdown of the greatest *cause célebre* in the Presidency within the last fifty years

When the Superintendent of Police sent his next diary through me I commented on this in very strong language to the Inspector-General That was eleven years ago, and have never heard anything about the matter since, nor, so far as I am aware, did the Inspector-General of Police take the slightest notice of it Had this not been so, it is very possible that an exceedingly unpleasant case, in which the same officer was concerned in 1899, would never have happened

Such are the relations between the District Magistrate and the police in Madras I think I may claim for this Presidency that these relations are not such as to give any cause for alarm as to the two departments working unduly together

The supervision exercised by the District Magistrate over the subordinate Magistrates is in no way calculated to interfere with the judicial independence of the latter, or to prevent them from arriving at any conclusion which their conscience dictates

I am in accord with the Hon'ble Mr J Thomson in thinking that the separation of executive and judicial functions, in the lower ranks of the service, by the appointment of Stationary Sub-Magistrates, was not desirable, and is not altogether a success If Government was willing to spend more money on establishment, that money would, in my opinion, have been better spent in reducing the charges of the existing Revenue Magistrates, and not in appointing an entirely different set of officers for criminal work Naturally these appointments do not attract the best men, and, in our endeavour to enlist higher legal attainments for the sub-magistracy, we have got men who, though possessing a certain hall mark, not necessarily denoting sterling metal, are often mere children in wordly experience However, in theory, and in countries to which such a system is suited, it may be desirable that the Judge should know nothing except what he hears in court, a knowledge of mufassal life, of its springs and action, modes of thought, etc, above all, a *knowledge of men*, such as the executive officer accumulates during his official career, is indispensable to the proper administration of justice Further, I might say that the Sub-Magistrate or Magistrate who is to know nothing except what he hears in court, must be deaf, blind and dumb, and must have no relations, male or female Any one who knows India will understand what I mean

There is no such thing possible as a Magistrate who knows nothing but what he hears in court The Criminal Procedure Code requires that all Magistrates must receive reports of certain kinds, and must pass orders on them It does not follow that they are prejudiced by them The attack, in the present case, however, seems to be levelled solely at the District Magistrate I do not quite understand what the memorialists want They want a District Magistrate who shall not be a Collector, and apparently one who shall have no dealings whatever with the police This latter is impossible in the nature of things, and I think on their own showing The District Magistrate must have relations of some kind with the police Even in England the paid magistracy receive reports from the police and issue orders on them If the Criminal Procedure Code were to be so modified as to prevent the magistracy, and especially the District Magistrate, from having any relations with the police, the criminal work of the district could not be carried on Is some "astral body" to supervise the work of the police and take action in the matters specially reserved to the District Magistrate? It seems to me doubtful whether the memorialists wish most to deprive the District Magistrate of his prestige as Collector, or to deprive the Collector of his prestige as District Magistrate In either, or both cases, the result—and possibly the deliberate object of the agitation—is to weaken the executive Now the executive in India cannot afford to be weakened

It is not very easy to conceive how the fact of the Collector being District Magistrate can enable him to abuse his powers as a Revenue officer No doubt Mr Manomohan Ghose has given some cases from which such an inference might be drawn, but, taking such cases at their worst, they originated in an abuse or an assumption of power, and there is no legislation which

can safeguard us from occasional attempts of this kind The error arose in despite, not in consequence, of the system objected to It cannot be too clearly recognized—and it is generally recognized in this Presidency—that the Collector has no "general powers" In ancient days, he had, and his word was law, possibly a return to those days would not in all ways be a disaster It had not occurred to people then to dispute the orders of the Collector they were generally right, and the petty vakil was not at hand to call them in question On the other hand, nothing is more suited to this country than a quick order, given on the spot, with the grasp of facts which comes from long experience In the absence of sowers of strife, such an order, based on natural justice, would be obeyed with general satisfaction But those days are past We have codes and rules, and appeals and reviews, and standing orders, and telegraphs and vakils The Collector has no "general powers" He has only such powers as the law and standing orders give him I am unable to conceive, in the province with which I am acquainted, any abuse or assumption of power which would not be subjected to immediate check and revision, nor would the fact that the Collector is also District Magistrate in any way facilitate the commission of abuses When the personal equation comes in, and temper and indiscretion are given sway, there may be attempts at irregularities, but the strong arm of law, of Government, and of public opinion would at once nip such efforts in the bud

The memorialists object to the future prospects of the sub-magistracy depending on the favour or good opinion of the District Magistrate Surely they must depend on the good opinion of some one, and that some one can, in the first instance, only be the District Magistrate, nor would this objection be weakened if the District Magistrate were not also the Collector It is not uncommon for a Magistrate to be removed from the commission of the peace in England, by the Lord Chancellor Though the Irish Members may furiously rage, and the Radicals imagine vain things, it has not occurred to any one to suggest that an "astral body" should be substituted for the Lord Chancellor

Personally, the District Magistrate in this Presidency does little original magisterial work Up to about twenty-six years ago it was an uncommon thing for a Sub-Magistrate to possess powers higher than those of a Third-class Magistrate About that time they began to be invested with second-class powers, and, for more than twenty years, this has been the rule In those days the Divisional Magistrates had to try all the second-class cases, and the District Magistrate had to do the original magisterial work of the "Head-quarter division," unless he had an assistant with first-class powers, or a good deal of it Government, too, was continually pressing the District Magistrate-Collector to do more original work, not, generally, with any result Subsequently, pressure of work compelled the appointment of Head-quarter Deputy Collectors and Magistrates, who relieved the District Collector and Magistrate of the immediate charge of the head-quarter divisions Since then the District Magistrate practically does no original or appellate work A few cases are reserved by the Criminal Procedure Code, in which the power of disposal and revision is reserved solely to the District Magistrate, and his original work is generally confined to such cases Appellate work, as a rule, he has none Appeals from second and third class Magistrates are disposed of by Divisional Magistrates Appeals from first-class Magistrates are reserved to the Sessions Judge Occasionally, when peculiar circumstances rendered it necessary, the District Magistrate may dispose of a special case, but, ordinarily, his work is that of supervision and revision As he is supposed to peruse and very generally does, more or less, peruse, the calendar of every case disposed of by the thirty or more Magistrates in his district, and pass proceedings, where necessary, on the same, this work of supervision is no small demand upon his time I do not see how he is in any way disqualified for task of supervision and revision by the fact that he is also the Collector, more than by the fact that he is also President of the District Board, or in some cases, Lay Trustee I presume that the non-Collector-Magistrates, whom the memorialists would substitute for the Collector-Magistrate, must still have relations with the police If not, then who is to represent the magistracy in communication with the Police? Not the Sessions Judge The main objection, coupled with gracious appellation of "thief-catcher," to the present Collector-Magistrate is that he is contaminated by his relations with the police He is not so contaminated, because he is a Collector · he must be so if he is to be a Magistrate The memorialists' line between executive and judicial is so finely drawn that is intangible I do not understand what they exactly want The Collector-Magistrate is not an executive officer solely because he is a Collector, but also because he has, and must have relations of some kind with the police further, in some matters, the Magistrate, as distinguished from the Judge must himself be an executive officer I am unable to evolve this idea of a non-Collector-District Magistrate who is not an executive officer, and who has no dealings with the police, nor I think, does the possible abuse by a Collector of his position as District Magistrate enter into the sphere of practical politics I find it difficult to conceive how a Collector could err with impunity because he is a Magistrate In all my experience I cannot recall a single case of this kind What I do think is that this agitation is a manœuvre to rob the Collector of his—so-called—prestige as District Magistrate, and rob the Magistrate of his prestige as Collector, and so weaken the administration for vakil and Congress purposes The fact that many of the signatories of the memorial are unconnected with Congress does not militate against this view · for nothing is more admirable than the address with which, under the guise of an academical question, the earlier approval of the signatories was obtained before the birth of the memorandum, by which it is sought to insert a disintegrating wedge into the most important structure of the administration, the disintegration of which connotes an increase of strength to the Brahmân vakil—*alias* the Congress—in every district in India.

The proposals for reorganization seem to involve either the creation of new offices, which the State cannot afford, or the increase of charges, by the relegation of some of the existing staff to duties purely revenue and executive, and others to duties purely judicial As to the latter the increase in the size of the charges alone would condemn the proposal, apart from other objections Mr Dutt proposes to hand over all the judicial duties of District Magistrate to the Sessions Judge The latter would then be in communication with the police He would also, as Chief Magistrate, be responsible for the peace of the district, for he cannot expect the Collector, shorn of his magisterial authority, to look after this The Judge is also to supervise and review the mass of magisterial work, committing himself to opinions which would disqualify him from giving an impartial judgment when cases come subsequently before him on appeal or committal Again the non-Collector-District Magistrate, if there should be one must, to be efficient, be of equal rank and service with the present Collector-Magistrate This would be too costly It would be possible to substitute a cheaper article. A large number of Brahman graduates, B As and B Ls, are available I should think that there must be some 350 districts in British India Three hundred and fifty well-paid appointments would be a considerable sop to the party which is continually complaining that the natives of India have not a sufficient share in the administration The Brahman vakil can be translated *per saltum* to the post of District Munsif why not also to that of the new District Magistrate? A junior Civilian as District Magistrate would have neither the weight nor experience which the office would demand The whole fabric of administration would be shaken, and, in time of trouble, would crumble to pieces The proposal is not either practically or pecuniarily possible The confusion of ideas which these proposals have produced in their own supporters reaches the summit of absurdity when Sir R Garth, discussing the "most natural and obvious means of separating the executive and judicial functions," holds it to be "only in accordance with reason that Magistrates who are employed on executive work should be under the executive officer of each district, and that those who are employed in judicial work should be under the chief judicial officer" I cannot grasp the idea of these two separate kinds of Magistrates Mr R C Dutt naively observes, in reference to the above, that "there is no higher authority on judicial questions concerning Bengal than the late Chief Justice of the Province" Admitting, for a moment, that this might be true, Mr. Dutt does not seem to perceive the absurdity of putting forward the Right Honourable gentlemen as an authority on "executive questions" and "administration,"—not merely in Bengal, of which he may know something—but in all extra-Bengal India, of which he knows nothing whatever Indeed, a general and practical ignorance of the administration of India seems to have been one of the chief qualifications of eight out of the ten signatories to the memorandum

It is worth while to consider who are the ten signatories who have lent their names to the memorandum which has elicited the present reference It may be presumed that Mr. Manomohan Ghose put the best goods available in the shop window

Before doing this it is necessary to draw attention to two statements in the covering letter which deserve attention The first is that "the improved condition of Indian finances will, in the opinion of 'The Indian Parliamentary Committee' justify the expenditure necessary to carry out this much-needed reform" Leaving aside the *petitio principii*, which represents as a "much-needed reform," a measure which is not a reform, and which is not at all needed we find that the petitionmongers reckon on a surplus, in the last two years, of Rs5,12,000 In this they were a little previous If a question of funds available is at all a factor in the case, it will be interesting to ascertain what the financial results of the two years will be when the account are made up, after allowing for famine expenditure, borrowing, etc

The second statement is that—to put the lower grades of the judicial service upon a satisfactory footing—a result which, from the opinions quoted above of Messrs Manomohan Ghose, M Taleyar Khan and Sir Saiyid Ahmad, would appear to have been already fairly attained, the time is opportune to give effect to the proposed "measure earnestly desired by the Indian community" I have no wish to use strong language, but I must designate this latter assertion as absolutely false If "the Indian community" means a small handful of, possibly sincere, mischief-makers, then the statement would be true, but if it refers to the three hundred and fifty millions of the population of British India, or even to any ponderable fraction of that community, it is absolutely false There is no other phrase which would adequately describe this postulate I assert, on the contrary, without hesitation, that "the Indian community" has never given this matter a thought, that "the Indian community" is wholly unaware that the question has ever been raised, and is perfectly satisfied with the existing state of things, that "the Indian community" has, generally, the fullest confidence in its Collector-Magistrates, and turns to them, with confidence, for protection in times of trouble and danger "The Indian community" knows that, generally, the Collector-Magistrate is absolutely fair and incorruptible, and, I might add, with some regret, for I would not intentionally cause pain to any one, that, almost invariably, wherever the provincial or statutory services have been substituted for the covenanted officer, the universal cry is "Give us a European Divisional officer."

To prevent any misunderstanding on this subject I must personally repudiate the slightest trace of racial feeling, and add that, while I believe Mr. Manomohan Ghose entitled to credit for honesty and sincerity in the mistaken view which he held, I consider his son, Mr Mahimohan Ghose, now in the Covenanted Service, to be an exceedingly promising, honest, hard-working and sympathetic officer, who will be a credit to the service to which he

belongs If I have any prejudice, it is a very strong feeling of attachment for the country in which, and the people amongst whom, I have been working for the last thirty-five years, and my sympathy for the people is no secret, but the "people" for whom I have such a regard is not the vakil, or the agitator, or the congresswallah or the firebrand editor

To return to the signatories of the memorandum

One is Sir W Wedderburn, *Bart* This is a gentleman whom no one takes seriously Any cause which he advocates is at once discredited by his adhesion This is the Member of Parliament who fathered Professor Gokhale's abominable slanders against the military engaged on plague duty in Poona I believe him to be honest, but absolutely wanting in balance Like Mr R C Dutt, his co-worker in the present agitation, who, since his retirement, vilifies the administration by ascribing famines to our unjust settlements, Sir W Wedderburn has been occupied, since his retirement, in a continual fanning of the embers of discontent, and persistently discrediting the administration, and the service, of which for so many years he was a member One cannot help referring to the native proverb about the cobra, which drinks milk from a saucer, and then bites the hand which filled it

Another signatory is Sir R R Wilson, *Bart*, late Reader in Indian Law at Cambridge Until I saw this gentleman's name on the memorandum I had never heard of him He is, no doubt, an authority, of some kind, on questions purely academical, but so far as I am aware he has never been in India, and knows nothing at first hand about it It is one thing to pronounce on practical matters, and quite another to advocate "abstract principles" The latter may be excellent in their way, but, for the present purpose—they merit only the fate assigned by Sir Peter Teazle to the "sentiments" of Joseph Surface

Six of the signatories—Sir R Couch, Sir R Garth, Sir Chas Sargent, Sir W Markby, Sir J B Phear and Sir J Scott—have been Chief Justices and Judges of High Courts in India I shall refer to them separately lower down I would here only remark that the positions held by these gentlemen in India, and their experience acquired in a Presidency town, in no way qualifies them for, and in some respects actually disqualifies them from, pronouncing on questions of district administrations Of the splendid results which the present system has produced in the Mofussil they can personally know nothing Setting aside all the good work which never came under their notice, there may have been one or two cases, in which rare exceptions to the general standard of the service have acted unwisely, and they may have heard of them. To argue from this that the whole system is rotten is not judicial, but these signatories do not appear to be even entitled to the crowning mercy of the fallacy *a particulari ad universale*, for not one of them justifies the faith which is in him by quoting a single case *in his own experience* in support of the wild statements of the memorandum The extreme sub-acidity of Sir R Garth's remarks inclines me to think that, had he known of any such cases he would have quoted them It is patent that the other learned gentlemen had no such experience

The first signatory to the memorandum is the Right Hon'ble Lord Hobhouse, formerly Legal Member of the Viceroy's Council I would say that neither Simla nor Calcutta are the places in which a gentleman, absorbed in legal reforms, could acquire a knowledge of the arguments for and against the existing system The memorable fiasco, associated with the name of Sir Chas Ilbert, shows how utterly unable a legal member may be to gauge public opinion, and to decide on points of administrative efficiency

As, however, Lord Hobhouse has subscribed to the wild statements of the memorandum it may be well to compare them with the language of his letter printed at page 5 of Appendix A

According to the memorandum, the present system is "*condemned by the general voice of public opinion in India*," a fact which is "so well known as to require neither proof nor illustration", by its existence, "the general administration of justice *is subjected to suspicion* and the strength and authority of the Government are *seriously impaired*, the memorandum quotes, with approval, a reference to "the *serious mischief* arising to the country from the combination of judicial and executive functions," "a system which is at present" (1899) "*responsible for many judicial scandals*," whose existence is "a matter of the *gravest possible importance*," and is "one of the *gravest stigmas* on British rule in India," and fraught with *incalculable oppression to all classes of the community*" Thus Lord Hobhouse of the memorandum Let us now appeal from Philip to Philip, and quote Lord Hobhouse's letter of January 7th, 1896 —In it the noble Lord says "I have been for many years detached from Indian affairs, and cannot speak with confidence or even with accuracy, on points of internal Government which must turn on details" "I have nothing to say except generalities" "How far the separation" between the executive and the judicial "shall be carried, so as to secure the utmost amount of independence in the judiciary that is consistent with the unity and stability of Government, is a question of statesmanship depending on the conditions of the country I believe that under Asiatic rulers the principle of independence was so merged in that of unity as to be very weak, even if perceptible And I have always claimed for our countrymen that we have either introduced it or made it a living thing" "I do not know whether my colleagues took such strong views as I as to the value of an independent judiciary, *nor do I think that any event in my time called for its discussion in a crucial shape*, such as brings out conflicts of opinion But it was, I think, generally assumed to be good, except for very backward and primitive parts of India, and the objection to making it more complete was mainly on the score of expense" . .

"These general views are all that I can express It is a *very long way to descend from them to particulars, and to say that the circumstances of the day not only demand but render possible a further extension of independent judiciary*" Thus Lord Hobhouse, when he speaks for himself I see nothing to which I would specially object in the letter from which I have quoted I cannot recollect the year in which Lord Hobhouse left India Probably there has been progress, as far as desirable, in the direction which he desired since then I must, however, after a perusal of the guarded and moderate language of Lord Hobhouse's letter, express some doubt as to whether he had read and really subscribed to the frothy denunciations of the memorandum I think it may be reasonably inferred that he meant, in signing it, nothing more than to subscribe to the enunciation of an academical principle, as to which he was not certain that it was practically desirable

Sir John Scott has signed the memorandum in 1899 Let us again appeal from Philip to Philip On the 24th May 1900 Sir J Scott addressed the Society of Arts on English and Indian Criminal Procedure In the course of this address he referred to the vexed question "of the separation of the executive from the judicial in the following words —

"The District Magistrate whose powers are not only judicial, but also superintendent as regards the subordinate judiciary, is an executive as well as a judicial officer This dual authority is not allowed in England The Magistrate who administers justice here is only a Magistrate, he is not held responsible for the peace of his district The officer so responsible is entirely separate from the Magistrate There is no doubt of the propriety of this separation But many authorities on Indian questions hold the theory inapplicable to India, or, at any rate, agree with Lord Dufferin, who put it aside as a "counsel of perfection" The objections raised are twofold, financial, because of the increase of the judicial staff that would be required, political, because of the loss of prestige, which would ensue to the executive, so essential to good administration in a backward country Moreover it is urged, with reason, the Collector, who is the District Magistrate, knows the people, and is able to act with great rapidity in important cases, whilst he does not attach undue importance to small offences I admit the force of these objections India cannot at present bear any further fiscal burthens, and prestige is a powerful factor in all Eastern countries It was easy for Montesquieu to sit in his arm chair and discourse upon the strict separation of the functions of Government, but in practice they can hardly be kept asunder by a hard-and-fast line. Even in England, a hundred years ago, the line of separation was often overstepped, and this counsel of perfection must take time for realisation But I submit such a separation, as far as it is possible, is an essential to good Government"

I can see nothing to object to in these words of Sir J Scott, but I feel justified in asking, had he read the memorandum before signing it? I am somewhat doubtful on the subject If, however, he had done so, it is plain that he does not, in 1900, hold the extreme views of the memorandum of 1899

Sir R Garth has both signed the memorandum and also written a letter, printed at page 1 of the Appendix A There is no appeal to Philip here, but I venture to think that the language of the letter completely puts Sir R Garth out of court First he speaks of '*the unseemly conflict which is still going on in India* between the judicial and executive services" I confess that I have never heard of this conflict it is possible that the executive has sometimes criticised the judgments of the Calcutta "High Court," to quote the language of Mr Manomohan Ghose on page 2 of the Appendix They cannot in any way interfere with, or reverse—except by exercising the right of pardon—any decision of the High Court Any one may criticise the judgment of any court, and I regret to say that, occasionally, the only High Court with which I am acquainted calls for very severe criticism If, however, a Local Government took upon itself to forward its criticisms to the High Court, this would, no doubt, be unconstitutional I do not know that they have done so Bengal, if they have done so, enjoys a monopoly of this, as of other privileges When, however, Sir R Garth goes on to generalize, speaks of the "*evils of the present system,*" of a "*shameful abuse*", alleges that the "*Government of India approves this scandalous system,*" and alleges that "*if the Government had its will, the independence of the Judges would be still further controlled, and the High Courts themselves made subservient to the will of the executive,*" he uses such language, and displays such temper, as shows him to be a prejudiced and an unsafe critic With such a temper it is conceivable that Sir R Garth may have come into collision with the Local Government, and that the latter may, on provocation, have indulged in criticism which has left a sting, *Hæret latere lethalis arundo* Sir R Couch, another signatory, seems to take the same view of Sir R Garth, as a prejudiced partisan, judging from his letter printed on page 6 of the Appendix Here, after assuming that Mr Manomohan Ghose's "fact' are uncoloured, he observes that he "cannot from his own knowledge give any opinion upon the action of the executive officers during the last twenty years" He adds "Mr Ghose says in the older days the executive were in the habit of loyally accepting the decision of the judicial tribunals" This, Sir R Couch states, "according to his recollection agrees with his experience in India," and then, referring to Mr M. Ghose's assertion, which he assumes, and which I deny, to be true, that "within the last twenty years there has been a manifest tendency to put pressure on our judicial tribunals to decide cases according to the wishes of the executive," he states that "he is unable to believe with Sir R Garth that the Government of India approves it, and would be sorry to see it altered" There is, therefore, a very considerable rift in the lute, and the signatories do not play in tune What is plain is that Sir R Couch has personally no cases of abuses to cite, and that Sir R Garth makes the campaign against the Collector-Magistrate an excuse

to rake up old quarrels between the High Court and the Government, which are in no way cognate to the point at issue

I have heard of friction between Government and High Courts regarding despatch of business, and this is a point on which possibly Government, and the litigating public, have had cause to complain Despatch of business is a question totally foreign to that of dictating to the tribunals what decisions they should pass, and I do not believe that the latter has ever been done In the one leading case on this subject, Sir J Impey has been completely exonerated

Sir J B Phear has nothing to contribute from his own experience of India, and has signed the memorandum on the strength of Mr Manomohan Ghose's assertions From the latter he infers that "there still lurks in influential quarters an indisposition to recognise the extreme importance, especially under the circumstances of our rule in India, of keeping the judicial and executive functions, so far as practicable, apart", but, leaving Mr Ghose aside, and harking back to his own experience, he adds that he "had imagined that all question on this point had been set at rest, so far as the expression of authoritative opinion could operate, at least a quarter of a century ago, and that financial and service difficulties alone have hitherto hindered the full attainment of the desired reform" In this moderate opinion I am almost agreed with him, adding that if by "service difficulties" he means "administrative difficulties" the latter are insurmountable Further down Sir J B Phear finds it difficult to believe "that there should be any such persistent endeavours on the part of any Government of British training, to make the judiciary practically subservient to the executive, as Mr Ghose represented to have lately been manifested in Bengal," adding that "incentives to such an endeavour are conceivable, but that to yield to these would be symptomatic of a lower order of statesmanship than one would like to attribute to one of the subordinate Governments of India There may be, and probably are, local officials who think that the prestige of the executive, as they understand it, must be maintained at any cost and at whatever hazard, but all should by this time know that the true strength of the British rule in India consists in the approach which it makes to the unbiassed administration of justice by the Civil and Criminal Courts, not merely as between private persons, but also between private persons of all classes and the Government, and that the surest way of upholding the prestige of the executive in the eyes of the people, and securing its efficiency, is to make it the visible supporter of an independent, impartial and competent, judiciary A step in the opposite direction is but a source of weakness to the executive itself This lesson has been written for us in almost every page of our own history, and I feel pretty confident that Sir Charles Elliott's successor is not one to disregard it" There is none of the sound and fury of the memorandum in all this The sentiments are such as any reasonable person would endorse There is, however, reading between the lines, one thing clear, *viz*, that there could not be room at the same time in Calcutta for two such strong personalities as those of Sir Charles Elliott and Sir R Garth

Another signatory, Sir W Markby, while not quoting a single scandal within his knowledge, makes the sweeping assertion that his view, which he supposes is held "by every one who has had any experience in the administration of justice," is that the union in the same person of judicial and executive functions *always* leads to injustice" He then, after pointing out that Mr Ghose's memorandum is sometimes irrelevant, goes on to speak of an India which, after thirty-five years' experience, is new to me, an India in which the Magistrates are "virtually Police officers" I have referred to this question above, but I may say here that I am not satisfied that the development of our Police force as I know it has been for the better of later years It is so far from being true that the Magistrates are Police officers, that, on the other hand, there is a great deal of friction between the departments If the Magistrates will not convict the police cases, the police very often vilify the Magistrate and accuse him of perversity or corruption In one recent instance a Magistrate, who was not sufficiently facile, was shot, in open cutcherry, by a police constable In another case I knew a high Police officer, whose cases were not convicted at the sessions, expressed his opinion that the Judge, now dead, and one of the most painfully conscientious officers in the service, was corrupt The police will sometimes try to prejudice the District Magistrate and set him against the Sub-Magistracy, or get him to interfere so as to have orders passed which will make their record and averages show better in the annual report Thus, if a case cannot be detected, the police sometimes report that it is false, and try to get it struck off the file as such The Sub-Magistrate refuses, and then they come to the District Magistrate, and, if he refuses, and my memory serves me right, they write up to their official chief about it The District Magistrate is, and should be, a protection to the Sub-Magistracy Where, however, the District Magistrate is weak, and lends too much ear to the Superintendent of Police, there would be a possibility of injustice, and, in such case, it might be said that the Magistracy were in terror of the police I will not say that there have never been such cases, but I think that they are rare, and I also do not see that any separation of the judicial and executive would heal this difficulty, for, whoever the head of the magistracy might be, and however cut off, which would be impossible in the nature of things, from the police, the latter, with a weak man, would find some means of making their influence felt It is in human nature that such things should be, and no readjustment of charges would cure it I think that a partial remedy would be, if possible, to strengthen the position of the Collector-Magistrate I have known cases, a very recent one, in which the Superintendent of Police rebelled against the District Magistrate, but the latter was a strong man, and brought him to his bearings at once His predecessor would, equally certainly, not have done so. The most important security against such results is that the greatest care should be taken in the selection of District Magistrates, and

disadvantages in friction, as witness the Twidell and Penell case, published in the *Gazette of India*, April 21, 1900 What would happen if, in a very hot and disorderly district, you had a Judge, a Collector and a Magistrate all equal, all hot, and in conflict ? We want to govern India with a minimum of Europeans, and we have now reached the irreducible minimum If we can afford to pay for more they should be the four-sided men of many functions and experiences which we now have, and not men divided off into separate departments and narrowed responsibilities"

In passing, it may be observed from the above that Sir James Fitzjames Stephen held different views from Mr Reynolds on a point on which, according to the letter, "men of all parties and interests are agreed"

I have already quoted from Sir J Scott's address in replying to Sir W Lee-Warner's letter he adds that "the progress towards complete separation of the two functions, has, as you show, been very great, and the practical success of present arrangements is quite sufficient to make the adoption of complete separation of small urgency. But the tendency is that way, and what I still think the true theory will in time eventually, though gradually, prevail There is much, however, to be said for 'letting well alone'"

Regarding the same portion of the address, Mr H M Birdwood, C S I, LL D, formerly Judge of the High Court of Bombay, observes that the Code of Criminal Procedure "ensures, so far as any rules can ensure, that all proceedings, in criminal courts shall be conducted with fairness and regularity, and it furnishes the requisite means for the rectification, by the superior Courts, of irregular and illegal proceedings, prejudicing the course of justice Our judicial system in British India, as administered under the control of the High Courts, is thoroughly appreciated by the people As regards the exercise of magisterial powers by Revenue officers, I would note that such a combination of executive and judicial functions is not opposed to the custom of the country or to popular sentiment, though it has been strongly objected to by some writers, nor is it productive of any such widespread evil as demands a subversion of the present system, or indeed of any evil results which cannot be remedied under the Code."

Further down he says that "it is mainly to the exercise of magisterial power by the Collectors and Assistant Collectors, and by mamlatdars or native collectors and their assistants, that objection has been taken Such a combination of functions would be regarded as anomalous in England, yet it commends itself to Indian indigenous sentiment, and it has secured the efficient and economical administration The people are accustomed to it, and are, I believe, satisfied that it works well on the whole Cases of abuse of judicial power has undoubtedly occurred, but they are very rare indeed, and the people are shrewd enough to see that they occur sometimes in spite of, and not as a consequence of, existing arrangements, and that redress can be obtained in cases of real oppression—which, moreover, might occur under any system, however theoretically perfect It is tolerably obvious that an Indian Magistrate will be more efficient as a Judicial officer if he has the knowledge which every Revenue officer acquires, in the discharge of his duties in all parts of his district, of the people and their ways of life, and that, in his capacity as a Revenue officer, he is less likely to be led into any illegal or arbitrary course of action if he has acquired, by education and actual judicial experience, some respect for legal principles The combination of judicial and executive functions in the person of any officer fitted by education and character for the duties of Indian administration seems to me, therefore, to be sound, and I should be sorry to see the authority of an Indian Collector weakned by his removal from the position of District Magistrate Any such measure would not fail to be regarded by the Indian ryot as a disturbance of existing and valid guarantees for the maintenance of public order, which is the keystone of our administrative system, on which depends the stability of our whole scheme of impartial government"

Sir Chas Cecil Stevens contributed to the discussion as follows —

"On the question of the separation of the judicial from the executive functions of the District Magistrate, I am of opinion that the balance of arguments is against a change—at any rate, under present conditions or in the near future In Bengal a district generally contains some two millions—often more—of inhabitants, a man capable of supervising either the Magistrates or the executive work must possess high qualifications and be highly paid The salaries now given are certainly not too high, the career of an Indian Civilian appears to be less tempting in the present day than the Home Civil Service The Government cannot afford to double the number of such officers A district officer is constantly expected to "use his influnce in matters outside his official functions, and even in work falling within them this influence is often effective and beneficial It is obvious that to lessen his powers must lower his influence and prestige The practical objections to the present system seem to me to be exaggerated The Chief Magistrate of a district tries very few original cases himself, in a heavy district he cannot possibly try many" . . . . "His interference is mainly directed to ensuring promptitude and regularity in the disposal of cases, and a suitable division of the work* He is available to advise subordinate magistrates if they require advice On the other hand, his knowledge of the judicial work enables him to watch the police,* very much to the advantage of the department and of the public In the Presidency towns the case is different, there is no necessity for a predominant district official representing the Government, and the police have for their departmental head an officer of special ability and experience At the same time, my own opinion is that the subordinate police in Calcutta have quite as much power as those in the

* This points to what I have elsewhere surmised, viz, that district organization in Bengal is on different lines from those obtaining in Madras

mofussil I am scarcely prepared even to admit that the separation of the judicial and executive functions in the mofussil is a 'counsel of perfection' I think it unsuitable to present circumstances Men are not perfect, and it is quite possible that instances of indiscretion, and perhaps, scandal, may be quoted against me, but these are not necessary or unavoidable, and they are few in comparison of the advantages of the present system When they do occur, the ample power of supervision possessed by the High Court provide an effective remedy."

In speaking of the system of revision and appeal Sir C C Stevens further observes that "there is, I may say, a good deal of supervision other than that provided for in the Code The Magistrate of a sub-division periodically examines the registers and records of his own court, and of his own subordinates The Magistrate of a district similarly inspects the work of all his Magisterial subordinates In Bengal the Commissioner, who is charged with the supervision of several districts, makes similar inspections, but, as he is not a judicial officer, and has no acknowledged powers in this department, he forwards his notes to the High Court for orders These several inspections have for their object to ensure that judicial proceedings shall be prompt and regular, that parties and witnesses shall not be put to needless trouble, and that any gross incapacity or misconduct shall be exposed The Government circulates reports of important rulings of the High Courts for the information of the officers The result of all this system of inspection and supervision is that, without interference with judicial independence, the administration of criminal justice is rendered far more efficient than it otherwise would be"

If the system is to be condemned for the shortcoming of the individual, then I venture to say that just as strong a case, quite as large a number of "horrid examples," could be brought together to serve as a basis for an agitation to place the judiciary, including the High Court and the Privy Council, under the control of the executive It is only recently that Sir R Couch was instrumental in framing, in the Privy Council, a decision which has sent a shudder of alarm through the ranks of the Hindu nobility in India; a decision so monstrous that Sir Comer Petheram, a late Chief Justice of Bengal, was led to criticise it, in a very able article, in terms which leave no doubt whatsoever that the decision was judge-made law of the most outrageous description The Madras High Court had previously decided in the same way, basing their decision on a former decision for which Sir R Couch was responsible As Sir C Petheram has shown, there was not even the excuse that the two cases were parallel, as they admitted of distinct differentiation, and the High Court, such as I remember it, when it contained such honoured name as Sir Colley Scotland, Sir Adam Bittleston, Messrs Frere, Innes, Holloway and Collett, would have had the courage to tackle the precedent, and rend it, as it deserved to be rent, in pieces The result is, that an impartable estate, with an income of eight lakhs of rupees a year, has been handed over to a supposititious bastard, that every Hindu impartable estate, which has hitherto descended like entailed property, may now be given or willed away to a dancing girl, or any other person whom the fancy or caprice of the temporary owner may suggest Now Sir R Couch is supposed to know something about law If his judgment is so absolutely untrustworthy on a matter of law, to what consideration is it entitled on a matter of administration, of which he personally has no experience whatever? It is rumoured that Sir R Couch, at the age of 83, proposes to retire from the Judicial Committee of the Privy Council This is a consummation devoutly to be wished, for his action in the Pithápuram case has shaken the confidence of Hindu suitors in the capacity of that tribunal I am no advocate that the executive should remove a Judge for an error, however outrageous, of judgment, but it would be just as reasonable to do this as to condemn the district administration of India for the errors of individuals

We have recently had two cases in Madras which might furnish a text for an agitation to modify the rule, *dum se bene gesserint*, on which High Court Judges base their tenure of office

A man of straw, named Muhammad Marikayar, sued Messrs De Clermont Donner & Co, through their agent, the South India Export Company, Limited, represented by its Managing Director, Herr Thummler, for balance of account and damages amounting to Rs 73,652

Boddam, J, tried the suit, and gave decree for plaintiff for Rs 1,08,544, or a trifle of about Rs 35,000 more than he claimed!

In execution proceedings taken by plaintiff before Boddam, J, the office, etc, of the South India Export Company was attached and all business stopped The Company thereupon presented a claim petition, stating that they were only agents of Messrs De Clermont Donner & Co, and that the South India Export Company's property was not liable for the decree against the former, at the same time, in view to have the interruption to their business removed, the Company deposited Rs 1,08,544, the amount of the decree, in Court

The claim petition then came on for hearing before Sir A Collins, Chief Justice, and Boddam, J, who held that Messrs De Clermont Donner & Co, of London, were identical with the South India Export Company of Madras In the course of enquiry the High Court Bench presiding browbeat and intimidated Herr Trummler in the most approved Old Bailey style

The case was appealable, and it was strongly urged that, as plaintiff was a man of straw, and there was no means of recovering the decree amount from him in case it was paid over to him, the decree amount should be retained, as the law allows, in Court, pending hearing of appeal, but Boddam, J, all representations notwithstanding, ordered the decree amount to be paid over to plaintiff, including the R35,000, for which he had not sued

Plaintiff straightway betook himself, as foreseen, to French territory, and calmly awaited events in Pondicherry

On appeal Mr Justice Boddam's decree was reversed, but the amount paid over to Muhammand Marikayar has not been, and never, will be, recovered Here, if ever is a case of a wrong without a remedy

Herr Thummler has shaken the dust of Madras from off his feet, and betaken himself to Germany, and, if he there represents that it is impossible to obtain justice from the Highest Court in India, I cannot say that his assertion is groundless The greatest indignation was felt here, in mercantile circles, at the treatment meted out to Herr Thummler by the Bench of the High Court I have lived much in Germany, whre the proceedings of the Highest Court are most dignified, and I state without hesitation that such a case as this could not possibly have occurred in that country

In "Zadig"—Chapter V—Voltaire narrates that a sort of Monthyon Prize used to be given annually at the Court of Babylon for the greatest act of virtue performed within the year Amongst other cases brought by the Wazir to the notice of the King, was that of a certain Judge, who having ruined a suitor by a mistake, for which he was not even personally responsible, sacrificed his whole estate to make the loss good The prize was not awarded to him, as the King observed—I quote from the German version– that his action was "schon, doch nicht unerhort" "Ich gestehe," said the King, "in unsern Geschichtsbuchern Beispiele gefunden zu haben, dass man einen Irrthum mit seinem Vermogen bezahlt"

It would seem that the tone which pervaded the Persian judiciary in those days does not obtain in Madras, for I have not yet heard that Mr Justice Boddam has considered it fit and proper to recoup the defendants even the R35,000 awarded by mistake, to say nothing of the whole R1,08,544, improperly decreed, and handed over, in a fit of temper, to the plaintiff

More recently the "Military Accounts extortion case" came before Mr Justice Boddam for trial In this case, the Judge, illegally, tendered a pardon to the second accused, one De Santos, and, on his evidence, given under this illegal inducement, convicted the first accused of extortion, having done this, he further proceeded to convict De Santos of the same offence, on the ground that the evidence given by him, under the illegal inducement, was not the whole truth The Advocate-General certified that the convictions were irregular, and that three was ground for revision, on which four of the remaining five Judges of the High Court joined Mr Justice Boddam in throwing the ægis of the Court's protection over the latter gentleman, the case is now before the Privy Council, and it is a matter of moral certainty that the conviction will be quashed I have been myself a Judge, I am a Barrister of nearly thirty years' standing, and have ample means of gauging public opinion, and I state, without hesitation, that the confidence of the public and of the profession in the present High Court has been shaken

In making this statement, I impugn in no way the integrity of any single member of that Court, no one entertains the slightest doubt on that point, but of the capacity and judicial balance of the Court there is room to doubt, and this doubt is one which has been growing, as the names enumerated on page 46 *supra* were gradually eliminated from the Bench

I have no doubt that other instances—"horrid examples"—of temper or incapacity could be enumerated If so, would this be any ground for tampering with the independence of the High Court? Most certainly not, but, when *ex* Chief Justices and Judges band themselves together with professional agitators to throw dirt upon the executive, they would do well to remember that they themselves inhabit palaces made of glass

The memorialists claim that their views have been urged by the "Indian press, by public bodies, and individuals well qualified to represent Indian public opinion" I must join issue with this, the Indian press to which they refer is largely manned and inspired by the Brahman vakil and members of Congress The latter body is in no way qualified to represent Indian public opinion It represents itself only, though, for its own ends, it would be glad to mould public opinion, and is working hard in some tracts to that end It consists of a few honest visionaries, a few honest faddists, and a great many of the discontented educated, mostly Brahman vakils, whose estimate of their own deservings would require that the administrative fabric should be reconstructed to make room for them The "public" knows nothing of them or their acts, except on the occasion of the erection of the Congress pandals, when the emissaries of that body are not ashamed to go into the highways and hedges, and collect, for the expenses of the meeting, the hardly-earned annas of the ignorant Sudra and Paraiya There are dozens of gentlemen in the ranks of Congress who could draw a cheque for the whole expenses of the meeting without feeling it, but one of the most remarkable things about these agitators is their extreme reluctance to testify to their sincerity through their pockets

I have no doubt of the loyalty of the members to Her Gracious Majesty the Queen-Empress though, and this is characteristic also of the native press, that loyalty—*in odium tertii*—generally masks an attack on Her Majesty's executive While, however, the loyalty of these gentlemen, who are quite subtle enough to know that there is nothing to be gained by a change of masters, is beyond question, I have no doubt that some of the darker spirits are far-seeing enough to look forward to a period when they may fish sucessfully in troubled waters It is especially the educated Brahman whose aspirations in this direction are boundless One of them, a thoroughly loyal and honest visionary, actually stated to me that he thought that it would be enough if the posts of Viceroy and Governors are reserved for Europeans, though he was careful to add that the 70,000 European troops should be retained Brahmans have been Diwans of Travancore, Mysore, Indore and Baroda, and Peshwas of the Deccan They would bring all India under their rule, just as they have filled all public offices with their caste fellows

The Brahman is the Jesuit of India, and takes long views More than two thousand years ago the supremacy of the priestly caste was established, and continually grows, retaining its precedence, though trespassing on the grounds and occupations of the other castes Brahman character is deep we may recognise traits and symptoms, but the workings are underground, and unseen A Brahman will work towards a certain end for years, and only at the last will his aims appear It is a matter of indifference to a class so thoroughly selfish that, in stirring up strife, they are playing with fire They have a serene confidence that, in any cataclysm, the Brahman will come out topside up Whether, however, authority should interfere to prevent the seduction and corruption of the masses, is a question for the statesman Meanwhile they are given rope on the policy of the safety valve

I have said above (page 39) that it was "absolutely false" that the measure now under discussion was "earnestly desired by the Indian community" the same might be said of many or all other fads paraded by the agitator, but how long will this be true?

In a confidential paper on the condition of the agricultural classes, I stated, some twelve years ago, that, in all our struggles in this country, the agricultural classes had been either neutral or on our side, but that it would be a difficult task to grapple with when, if ever, they should be against us, and what I now state is that the attempt is being made to corrupt the mind and temper of the people The ramifications of the Congress are being extended so as to gather the agricultural classes into the net Next to Congress come "the District Associations," bursting with the usual protestations of loyalty and the usual formulations of grievances These associations tap a lower stratum than that reached by Congress, and, being local, their action comes more home to the ryots Below the "District Associations" come the "Unions", which are petty clubs, uniting a few villages or a taluk I have tried to get a list of the members of these unions, to which I knew that some of our village officers belonged, but my agency informed me that it was impossible to do so These "Unions" are quasi-social, but, if they only know it, really political bodies worked by the central caucus

There is a lower depth reached in the "karnams' (village accountants') leagues" which are formed to supply the agitators with information when wanted, and to strengthen the village officer in resistance to the Revenue officials It is only recently that, when a Collector punished a village officer for some offence, he was taken to task by the "Secretary to the Karnams' league"

There are optimists who pooh pooh these bodies and their workings, call Congress a safety valve, etc The recent troubles in Poona and the general refusal to pay the Government revenue there, are but symptoms of the small cloud, as large as a man's hand, which may later overshadow India If it does not, it will not be the fault of the agitator, and, for this reason, it is all important that the hand of the executive should be strong, while the object of the agitator is to paralyse it "Behold," they say, "how academically beautiful on the mountains are the feet of them which bring us a counsel of perfection" So Delilah enticed Sampson, and, when she had shorn him, delivered him to the Philistines Shear the head of the district of his prestige and influence, and the rough places for the agitator will be made plain

I have said elsewhere that it was all important that strong and able men should be selected for the post of the District Magistrate I will give an instance of the contrary procedure and its results —

In a certain district, Mr A, a newly appointed Collector, was specially warned by his predecessor against B and C, the heads of two Brahman sub-caste divisions, the one a revenue official and the other a shady vakil, in terms too strong for repetition The Bank Agent, a hard-headed Scotchman, who had been thirty-four years in the same district, endorsed this opinion in equally strong language

Mr A had not been fifteen days in the district when he wrote to his predecessor, saying that he found the District Board in a state of rebellion, he thought the best way to manage it was through one of themselves, and so he had appointed C to be Vice-President of the Board. It is worth mention that Mr A's predecessor had already nominated an official to the post The District Board had been in rebellion for a long time before, but the disturbing elements, which wanted to convert it into a debating society, with interrogatories to the President, had been suppressed by Mr A's predecessor C was an active Congresswallah, the Jorkins to the Spenlow of the sitting elected member of the Legislative Council Mr A promptly made over to C nearly all his own powers and work as President, and C set to work to fill, by degrees, both the District Board and all the Taluk Boards, and Municipal Councils, with his own creatures By this means he got the whole district into his own hands, secured, on the retirement of Spenlow, his own election to the Legislative Council, engineered a powerful opposition to, and in fact delayed for four years, the re-settlement of the district, an opposition in which Mr A lent—innocently—much help, having sunk to be practically the mouthpiece of the local agitators The ryots of that district have been stirred up to discontent, and the whole political apparatus for agitation thoroughly organized Mr A, known in the local native paper, manipulated, and I believe owned, by C as "the noble Mr A" then took leave, and was succeeded by Mr X, a strong man, who promptly cancelled all the powers delegated to C, who immediately resigned, and gradually got his district in his hand, though it would take nearly three years before the agitators' nominees on the various Boards could be reduced in numbers

This is not all Mr A had an honest and trustworthy Serishtadar, who unfortunately died, on which Mr A promptly nominated to the highest Revenue post in his gift, involving influence and power over the whole district, B, the other man against whom he had been specially warned Not only did he do this, but he handed over all the confidential papers in his charge to B, who took and kept them in his own house This Mr. X, also put to rights,

but, whatever else was missing is not certain, one most confidential paper, the publication of which would raise a storm which would reach to Westminster, and for which Mr A's predecessor had taken a formal receipt in writing from Mr A, was missing B subsequently died, and Mr X is probably still looking for that paper, and there is no knowing in whose hands it is, or when it may be produced to work mischief

I have referred to this case, as one, of probably many instances, which Indian experience might cite, of the danger which follows the appointment to the post of Magistrate and Collector of any officer who is lacking in the special qualities which that post demands

The engineering of the present agitation is worth noting First Congress formulates a counsel of perfection and prays that it may be translated into an administrative fact Then Mr Manomohan Ghose works up his list of "horrid examples," the last of which is dated 1894 *India*, the Congress organ in London, is roused up, and a discussion in which certain "idle hands" took part is raised Mr Manomohan Ghose comes to London in 1895, and, as if he, and Congress, and *India*, were total strangers, he is "interviewed" on behalf of *India* and the interview printed The report of the "interview" bears distinct internal evidence of being a "put up" thing and probably reduced to writing before the interviewer arrived The "interview and the "horrid examples" are circulated (1896-97) to the celebrities who were to grace the shop-window, and general replies from some, and a venomous one from Sir R Garth, who had been in the field—page 8 of the Appendix—so early as 1893, followed In fact Sir R Garth would seem to have been working with Mr Manomohan Ghose from an early period The owners of the necessary "names" having committed themselves to the principle, the memorandum was concocted in 1897-99 The first five pages of that memorandum are ancient history ingeniously inserted to awake a prejudice against existing administration, by representing it as closely allied, or almost identical, with a system which the memorialists knew to be exploded Having "darkened counsel" by the first five pages, the memorialists proceed to formulate, on the sixth page, their postulate that, "in the words of Sir J P Grant in 1854 the functions of criminal Judge should be dissevered from those of thief-catcher and public prosecutor" Memorialists knew that "thief-catcher" would awaken prejudice, and, being perfectly aware that it was not applicable to existing circumstances, dragged it in, head and shoulders, for that express purpose So exploded is the combination of functions, that they might better have prayed that the Home Secretary, who is the only Court of Appeal in criminal matters from the High Court of Justice in England, and who is in daily communication with the police, should be disestablished, for it is a distinct blot on English Criminal Law that no judicial court of criminal appeal exists The signatories already committed to the principle involved signed the memorandum, without, as would appear in some cases, having read it The first fruits which the memorandum was intended to produce clearly disclose the cloven hoof, *ex ungulo cauxidicum* In the language of Congress, *vide* page 8 of the memorandum, the Secretary of State is requested "to order the *immediate appointment, in each Province*, of a committee to prepare each a scheme for the complete separation of all judicial and executive functions," and the committee should be one, "*one-half at least* of whose members shall *be non-official natives of India, qualified by education and experience in the workings of the various Courts* to deal with the question," *i e*, a matter involving the peace and order and administration of all India is to be handed over to the vakils for disposal! *Cela sent son Pantin d'une lieue*

The one remaining step was to forward the memorandum to the Secretary of State under the signature of Sir W Wedderburn, of Gokhale fame, and of Mr J H Roberts, of whom no one ever heard before

I regret that I have treated the subject at such length, but the proposal is one so pregnant with mischief that I felt bound to treat it in full The reference being "confidential," I have felt at liberty to speak without reserve

S. G. P. I., Delhi—No. 258 H. D.—13-3-13.—100

Appendix XIV.

I submit a single note on the very important question of the separation of judicial and executive functions as it is undesirable that its consideration should be complicated by a number of departmental notes I have received much assistance from Mr Williams, particularly in regard to existing practice in England, the paragraph on which has been practically written by him Messrs Fuller, Carnduff and Greeven have also contributed assistance in the preparation of statement of the existing functions of the different authorities, criminal, revenue, and civil in this country I must apologise for the length of the note, I found it impossible to dispose of the matter in less compass

2 The memorial begins by stating that "the present system under which the chief executive official of a district collects the revenue, controls the police, institutes prosecutions, and at the same time exercises large judicial powers has been, and still is, condemned, not only by the general voice of public opinion in India, but also by Anglo-Indian officers and by high legal authorities" This general statement is followed by an historical retrospect referring to some of the occasions upon which the principle of separation is said to have been approved by official authorities, then by a second section explaining the existing grievance and the remedy, then by a third section containing answers to possible objections

3 Paragraphs 11 to 14 contain the statement of the existing grievance and the remedy The grievance is said to be that the administration of justice is brought into suspicion while judicial powers remain in the hands of the detective and public prosecutor The arguments said to have been advanced of late years by independent public opinion in India are thus summarized (1) that the combination of judicial with executive duties in the same officer violates the first principles of equity, (2) that while a judicial officer ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his district, (3) that executive officers in India, being responsible for a large amount of miscellaneous business, have not time satisfactorily to dispose of judicial work in addition, (4) that, being keenly interested in carrying out particular measures, they are apt to be brought more or less into conflict with individuals, and, therefore, that it is inexpedient that they should also be invested with judicial powers, (5) that under the existing system Collector-Magistrates do in fact neglect judicial for executive work, (6) that appeals from revenue assessments are apt to be futile when they are heard by revenue officers, (7) that great inconvenience, expense and suffering are imposed upon suitors required to follow the camp of a judicial officer who, in the discharge of executive duties, is making a tour of his district, and (8) that the existing system not only involves all whom it concerns in hardship and inconvenience, but also, by associating the judicial tribunal with the work of the police and of detectives, and by diminishing the safeguards afforded by the rules of evidence, produces miscarriages of justice and creates, although justice be done, opportunities of suspicion, distrust and discontent, which are greatly to be deplored Of these objections Nos 3 and 5 do not tell against the principle of the union of the executive and judicial functions

History of the case in Bengal

4 Although the main object of the memorial is the separation of executive from criminal judicial duties, the memorialists press for a complete separation of judicial and executive functions This would involve the removal of jurisdiction in revenue and civil cases (where it still exists) from the officers employed in executive duties To make the case complete it seems desirable to enumerate the different judicial functions exercised in different parts of India by executive authorities, but before doing so, it will, I think, be advantageous to notice how the present system has grown up by a reference to the history of the development in the Province of Bengal

The first step taken by the Company, after the acquisition of the Diwani, to improve the administration of justice, was embodied in the Regulation of August 15th, 1772 Two Courts, *viz*, a Diwani or Civil Court, presided over by the Collector as Diwan, and a Faujdari or Criminal Court, were instituted for each Collectorate The Kazi and Mufti of the district and two Maulvis sat in the Criminal Court to expound the Muhammadan law, and to determine how far accused persons were guilty of its violation, the Collector had to see that the proceedings were regular, and the decision fair and impartial There was an appeal from the Civil Court to the Sadar Diwani Adalat, and from the Criminal Court to the Nizamat Adalat

In 1774 Provincial Councils were established at six places, in which the administration of civil justice was vested, the powers being exercised by one member in rotation Faujdars or native officers of police were appointed to 14 districts in order to suppress dakaiti

In 1780 Civil Courts, independent of the Provincial Councils, were established in the six divisions, each presided over by a Company's servant, called Superintendent of Diwani Adalat, which dealt with all causes of a civil nature Revenue cases were reserved for the jurisdiction of the Provincial Councils In 1781 18 Civil Courts were established including the 6 above mentioned, 14 of them under Company's servants called Judges, and four (in frontier districts) under Collectors In the same year the Faujdars appointed in 1774 were abolished and the Judges of the Civil Courts were invested with the power as Magistrates of

apprehending dakaits and persons charged with the commission of any crime or acts of violence They were not authorized to try or punish such persons, but had to send them to the nearest Faujdari Courts

In 1787 the Directors, stating that they were actuated by the necessity of accommodating their views and interests to the subsisting manners and usages of the people, rather than by any abstract theories drawn from other countries or applicable to a different state of things, ordered that the offices of Judge and Collector should be united in the same person, who was also to have the power of apprehending offenders against the public peace, their trial and punishment being still, however, left with the Muhammadan officers of the Nawab In 1790 the Governor General in Council resumed the superintendence of criminal justice throughout the province The Nizamat Adalat was removed to Calcutta, and made to consist of the Governor General and Members of Council, assisted by the head Kazi and two Muftis Four courts of circuit were established to be presided over by two covenanted civilians assisted by a Kazi and Mufti In 1793 the revenue courts were abolished by Lord Cornwallis, and all judicial powers were taken away from collectors Cases hitherto tried by Collectors were made over to the civil courts presided over by the Judge who, in his capacity as Magistrate, was vested with the superintendence and control of the police In 1810 power was taken to appoint a person other than the Judge to hold the office of Magistrate In 1818 Magistrates' powers were raised to the existing limits In 1821 a permissive regulation was passed empowering the Governor General in Council to invest a Collector with the powers of a Magistrate, or a Magistrate with the powers of a Collector In 1831 the Magistrate-Judge having been appointed Sessions Judge, the offices of Collector and Magistrate were amalgamated The Collectors found themselves overburdened with work, and they consequently neglected their magisterial duties In 1837 Lord Auckland obtained sanction to the separation of the two offices, and this was gradually effected in the course of eight years The Magistrate in Lower Bengal was paid Rs 900 a month, and the Collector Rs 1,900 or Rs 1,500 according to grade The Magistrate was the chief police officer, there was no separate police department, and as well as having to hear all crime reports, watch over all investigations and instruct the police in their methods of carrying them out, he had all the judicial work of a Magistrate of a district As a rule, he had few or no Magistrates with anything but the lowest powers to assist him The office of Magistrate fell into the hands of junior members of the service with bad results on the administration of justice This was the system so strongly condemned by Sir F Halliday, Sir J P Grant and Sir B Peacock, and it will be conceded by everybody that it was open to the strongest objections The Government found it necessary to alter it, and in 1859 the offices of Magistrate and Collector were again united, and have remained so ever since This change was followed by the enactment, in 1861, of the Police Act creating a separate Police Department under the control in each district of a District Superintendent of Police, placed under the general supervision of the Magistrate of the district

5 The system at present in force, whatever its defects, cannot fairly be criticised, as the memorialists appear to suppose, on the same lines as the system which it supplanted in Bengal In his magisterial capacity the District Magistrate has the full powers of a Magistrate of the highest class, the most important of which are that he is competent to take cognizance of offences on complaint, police reports, information or personal knowledge or suspicion Apart from certain heinous offences declared to be triable by the Court of Sessions only, he is competent, subject to an exception in the case of Europeans, to pass sentences of rigorous imprisonment up to two years or a fine of Rs 1,000 (with an alternative term of imprisonment not exceeding six months), or both He may also, in cases specified in a special enactment on the subject, impose sentence of whipping not exceeding thirty stripes In one province, *viz*, the Madras Presidency, where the districts are larger than in any other part of India, these powers are very rarely exercised by the District Magistrates The Magistrate in charge of the subdivision of a district in the Madras Presidency is, so far as the exercise of original and appellate criminal powers goes, very much within his own division in the position of a Magistrate of a district in other parts of India In seven provinces* the District Magistrate may be especially empowered to try all offences not punishable by death, and to pass any sentence except a sentence of death or of transportation or imprisonment for a term exceeding seven years No appeal lies from sentences passed by him if they are sentences of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only In the case of certain offences declared to be triable by summary procedure, the limit of non-appealable sentences of imprisonment and of fine is raised to three months and two hundred rupees respectively

Existing criminal judicial powers of District Magistrates

* Punjab, Burma, Oudh, Sind | Coorg, Central Provinces, Assam

The Magistrate of a district possesses, and may at any time have to exercise, general powers of arresting offenders, issuing search-warrants, inclusive of the orders for delivery of documents in the custody of postal and telegraph authorities, dispersing unlawful assemblies, if necessary, with the aid of the civil or military force, recording statements and confessions during police investigations, requiring security to keep the peace and for good behaviour, deciding disputes likely to cause a breach of the peace in respect of the possession of immoveable property, taking steps for the removal of local nuisances, holding inquests, and ordering released convicts to notify their places of residence

His powers of supervision include general powers of distributing, transferring and withdrawing cases pending in any of the magisterial courts, discharging persons under security to keep the peace or to be of good behaviour, hearing appeals from orders requiring security for good behaviour, and from sentences passed by Magistrates of the 2nd and 3rd class, and calling for records of inferior courts and ordering commitment, further inquiry, or report to the High Court

The Districts Magistrate's concern with the detection and prosecution of cases is only remote, and he rarely interferes in such matters The Subordinate Magistrates have no share in the control or command of the police except the powers conferred on them as Magistrates by the Criminal Procedure Code

Police powers of District Magistrates

6 In paragraph 29 of their report of September 1860 the Police Commission observed that, with the constitution of the official agency existing in India, an exception to the rule that persons engaged in police duties should not have judicial functions must be made in favour of the district officers They said "It is impracticable to relieve the Magistrates of their judicial duties, and, on the other hand, it is at present inexpedient to deprive the police and public of the valuable aid and supervision of the district officers in the general management of police matters That, therefore, it is necessary that the district officer shall be recognized as the principal controlling officer in the police administration of his district And that the civil constabulary under its own officers shall be responsible to him, and under his orders for the executive police administration"

This recommendation was followed in section 4 of Act V of 1861, which runs "The administration of the police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent of Police and in such Assistant District Superintendents of Police as the Local Government shall consider necessary" The Local Government is empowered to make rules to regulate the procedure to be followed by Magistrates and police-officers in the discharge of any duty imposed upon them under the Act, and the relations between the Magistrate of the district and the police are defined in the Police Manuals They differ somewhat in different provinces

In Bengal the rules are to the effect that "the District Magistrate has no authority to interfere in the internal organization and discipline of the police force, but in other respects, he is the head of the police The District Superintendent of Police is, in fact, an aid to the Magistrate for the superintendence of the police of the district The Magistrate is entirely responsible for the peace and criminal administration of his district, and the District Superintendent is his assistant for police duties, and, as such, is bound to carry out his orders He is independent of him in so far as regards the internal economy of the force, and everything of a purely departmental nature, but even in such matters he is expected to pay due regard to his wishes and suggestions'

In the United Provinces the Magistrate of the district is the controlling authority of the police within his district The District Superintendent of Police is in the position of an Assistant to the Magistrate in the Police Department and entirely subordinate to him The consent of the Magistrate of the district must be obtained to the transfer, from one part of the district to another, of police-officers above the grade of constable, and the Magistrate of the district may direct any such transfer *suo motu* and carry it into effect All serious cases have to be reported to the Magistrate of the district immediately by the police, and the District Superintendent of Police has to send him an abstract daily report of all crime reported and other matters of interest

In the Punjab the District Superintendent of Police and the Police subordinate to him are declared to be subordinate to the Magistrate of the district, as executive head of the police All postings, removals or transfers of officers in charge of police stations are made by the District Superintendent of Police only after consultation and in compliance with the orders of the District Magistrate

In Burma the Magistrate of the district is the controlling authority of the police within his district The District Superintendent is in the position of an assistant to the Magistrate in the Police Department The District Magistrate has a general control, but it is the District Superintendent who is responsible for the detailed administration of the police

In the Central Provinces the police area of a district is said to be "Under the control and supervision of the District Superintendent" The District Superintendent of Police enlists all constables subject to the veto of the Deputy Commissioner The District Superintendent of Police makes all promotions to the higher grades of constables and to the lower grades of head constables Promotions to higher grades than this have to be submitted through the Deputy Commissioner to the Inspector-General

In Assam the administration of the police throughout the local jurisdiction of the Deputy Commissioner of the district is vested in the District Superintendent of Police under the general control and direction of the Deputy Commissioner The Deputy Commissioner is entirely responsible for the peace and criminal administration of his district, and the District Superintendent is his assistant for police duties, and, as such, is bound to carry out all his orders

Madras and Bombay have separate Police Acts That for the former Presidency was passed in 1859 before the Police Commission had reported It does not contain the provision in Act V of 1861 about the position of the Magistrate of the district An executive order of the Madras Government declares that in the Madras Presidency the general maintenance of peace in the district and prevention of crime devolves on the District Superintendent of Police under the general administrative and judicial supervision of the Magistrate The District Superintendent of Police is required to keep the District Magistrate specially informed of all matters relating to the well-being and management of the district in a police aspect The appointment, dismissal and punishment of the ordinary village police rests entirely with the Magistrate of the district All officers of the police force are declared to be absolutely subordinate to the Magistrate in the strict sense of the term, and to be bound to carry his orders into execution without cavil or delay I cannot trace orders in the Madras Presidency that particular kinds of cases are to be reported to the Magistrate of the district The Madras Government contend that the District Superintendent of Police is less in subordination to the Magistrate in the Madras Presidency than in Bengal, and judging from the standing orders, it would appear that he is so

The provision in the Bombay Act (IV of 1890, section 13) on this subject is to the effect that the District Superintendent and the police force of a district shall be under the command and control of the Magistrate of the district, who shall, in exercising this authority, be governed by such rules and orders as the Government may from time to time make, and shall be subject to the lawful orders of the Commissioner The District Superintendent of Police may be required by the Magistrate of the District (section 15) to furnish reports, particular or general, on any matter connected with crimes, the condition of the criminal classes, the prevention of disorder, the regulation of assemblies and arrangements, the distribution of the police force, the utilization of auxiliary means, and all other matters in furtherance of his control of the police force and the maintenance of order He can call on the District Superintendent of Police (section 16) to substitute another officer for a subordinate who shows marked incompetence or unfitness for the locality or for his particular duties The directions in the Bombay Manual provide that the District Superintendent of Police is in fact an assistant to the Magistrate for the superintendence of the police of the district, but the District Magistrate will not ordinarily interfere in the internal organization and discipline of the police force

Revenue functions of District Magistrates
While Revenue Courts have no jurisdiction

DENZIL I[BBETSON]

7 With regard to the revenue functions of executive officers Mr Fuller writes —"In spite of Lord Cornwallis' pronouncement of 1793, Regulation VII of 1822 (which may be regarded as the foundation of revenue law and procedure in the Bengal Presidency) barred the jurisdiction of the Civil Courts on questions connected with revenue assessment (section 14), or the terms of settlement (section 17) These provisions have been repeated (with more or less amplification, so as to cover operations incidental to assessment) in the revenue legislation of all provinces in the Bengal Presidency including Burma In Bombay the entertainment by Civil Courts of objections to assessment is barred by a special Act (X of 1876) passed to define the jurisdiction of the Revenue Courts The discussion which took place in the Imperial Legislative Council on the passing of this Act is of peculiar interest in the present connection, as Lord Hobhouse, as Legal Member of Council, championed on that occasion the view that questions in which the land revenue interests of Government were involved should be removed from the jurisdiction of the Civil Courts, and maintained a position which is precisely the opposite of that now taken by him Previously to the passing of this Act the Bombay revenue system (like that of Madras at the present day) had the support of no recent legislation, but rested on an old Regulation (XVII of 1827), the wording of which gave some ground for the opinion that the discretionary powers of the Government in assessment of revenue were subject to question in the Civil Courts In two cases of some importance the Civil Courts claimed and exercised the right to try a suit against Government calling in question the propriety of its assessment (in one case the ground of action was that the assessment exceeded a sixth of the produce), and, although in a case of later date the High Court disallowed these proceedings, yet its pronouncement was regarded by the Legal Member as an *obiter dictum*, and, with his support, an Act was carried in the face of strong opposition with the object of definitely securing the discretion of Government against limitation by a Civil Court's decision In Madras, Act II of 1864 (section 58) similarly excludes the Civil Courts in all matters touching the rate of assessment In no province of India, then, can the claims of the Executive Government to alter the land revenue on the expiry of a settlement be called in question by civil suit

There is no such uniformity of system in regard to disputes between the Government and private persons as to the legality of proceedings for the *collection* of revenue The sale law of Bengal (Act XI of 1859) allows of resort to the Civil Courts to question the legality of Collector's sales in recovery of land revenue arrears, and the Certificate procedure in force in this province, under Act VII of 1880, also enables the Civil Courts to question the legality of a Collector's arrear recovery certificate, provided that the amount under dispute is lodged in the Collector's office In the non-scheduled area of Bengal, to which these Acts apply, a man can therefore claim the interference of the Civil Courts in cases where revenue has been recovered from him which he is under the terms of the settlement not liable to pay But in the scheduled districts of Bengal the exclusion of the Civil Courts in this matter has been generally a feature of the special revenue legislation undertaken to meet the peculiar circumstances of

these tracts Thus Act I of 1879 (section 37) excludes the Civil Courts from the cognizance of all matters connected with revenue (and rent) in Chota Nagpur save in such special cases as mistaken execution of a decree This line has been followed in the revenue legislation of the other provinces of the Bengal Presidency alike in the case of scheduled and non-scheduled districts, in all of which (the Punjab, United Provinces, Central Provinces, Ajmer, Assam and Burma) a man who has been made to pay land revenue in excess of the legal demand must look for redress to appeal preferred within the Revenue Department On the other hand, the procedure of Western and Southern India corresponds to that of the non-scheduled area of Bengal in permitting the collection of revenue to be questioned in the Civil Courts In the Bombay Presidency Act X of 1876 expressly authorizes Civil Courts to interfere in cases where land revenue is claimed in excess of assessment, or in spite of payment, and under Madras Act II of 1864 private persons can also have recourse to the Civil Courts for remedy in cases of this description

I have examined this extraordinary statement from the Punjab, United Provinces and Upper Burma It is absolutely opposed to fact in all three !

DENZIL I[BBETSON]

Ancillary to the assessment of land revenue are certain incidental operations, the chief of which is the settlement of rent The law of Bengal (Act VIII of 1885) permits of the settlement of rents by a revenue officer, but provides for appeal from his orders to a special Civil Judge (section 108) who is under the control of the High Court, whether Government is itself fiscally interested in the amount of the rent—as in the temporarily settled districts of Orissa—or not, as in Bengal proper and Behar In the scheduled districts of Bengal rent jurisdiction is limited to the Revenue Courts In the Punjab, the United Provinces and the Central Provinces the decision of a Settlement Officer fixing a rent cannot be questioned in the Civil Courts Settlement officers have no power to fix rents, as opposed to revenue, in Ajmer, Bombay, Madras, Assam and Burma No rent law has as yet been introduced into these provinces

Other important cases which are decided in the course of re-settlement are those connected with—

(1) the resumption of rent-free or revenue-free tenures ,
(2) the distribution of profits between superior and inferior right-holders in the settlement,
(3) the framing of the record of rights ;
(4) partitions, and
(5) the regulation of the staff of village-officers

In no province of what has been known as the Presidency of Bengal (including Burma) have the Civil Courts power to interfere with the *resumption of revenue-free grants* · Government does not ordinarily concern itself with the resumption of rent-free grants (which involves interference between landlord and tenant), but in cases where the revenue law specially provides for the resumption, as under section 79 of the North-West Provinces Land Revenue Act (XIX of 1876), the Civil Courts are not allowed to question the revenue-officer's decision The law of Bombay (Act X of 1876) permits Civil Courts to interfere with the resumption of revenue-free tenures, but only in the districts which constitute the "old provinces" of the Presidency Civil Court jurisdiction on this question is of very long standing in these districts and Act X of 1876, while negativing the pretension which Civil Courts had put forward to review revision assessments generally, maintained their jurisdiction in this class of cases In Madras the Civil Courts have apparently no powers of interference with the resumption by Government of revenue-free grants

Where, as in the case of estates held by superior and inferior proprietors in the United Provinces and the Central Provinces, the Settlement officer has authority to pass orders in regard to the *distribution of proprietary profits*, the Civil Court cannot concern themselves with the matter In all provinces of the Bengal Presidency the Settlement officer does not stop short at determining the land revenue and the persons responsible for its payment he proceeds to draw up a "*record of rights*" giving a full account of all subordinate tenures in the estate and of village customs relating to common pasturage, the levy of contributions for village expenses, and the like The entries in this record are in the Punjab, the United Provinces, the Central Provinces, and Ajmer declared to be presumptive proof in the first three provinces a person who considers himself aggrieved by an inaccuracy can only secure its correction in revenue appeal in the Central Provinces and Ajmer he may in certain classes of cases invoke the intervention of the Civil Courts In Lower Bengal the record of rights is drawn up subject to appeal to special Civil Judge As regards the *partitioning of estates*, in the provinces in which settlement is by mahals (the Punjab, the United Provinces, the Central Provinces, Ajmer and Bengal) the sub-division of landed property affects the security of Government for the payment of its revenue, and accordingly the partition of land in accordance with declared or admitted rights and the distribution of the assessed revenue is reserved to the Revenue Courts, the jurisdiction of the Civil Courts being limited to the declaration of a right to partition The Civil Courts have no power of interference with the method in which partition is effected But should in the course of partition proceedings questions of right or title arise and the revenue officer decides them, a Civil Court appeal lies from his order As a

general rule such questions are referred by the partitioning officer to the Civil Court, proceedings being stayed pending their decision In ryotwari provinces partition is of less importance The Civil Courts can pass no order which would entail a change in the register of revenue payers and the sub-division of holdings is effected executively In Bombay the law prescribes a procedure Finally, cases connected with the succession to and emoluments of village-officers are in all provinces limited to the cognizance of the Revenue Courts

In some provinces Revenue Courts have an exclusive jurisdiction in disputes between landlord and tenant This is the case in the Punjab and the United Provinces where all suits between landlord and tenant, whether involving questions of fact (such as the due payment of rent) or questions of status or liability, are exclusively triable by Revenue Courts But the law of the Punjab and what have till now been known as the North-Western Provinces empowers a revenue officer to refer to the Civil Courts questions in issue, involving a point of law, which appear to him to be more proper for the decision of a Civil Court, and in both the Provinces of Agra and Oudh an appeal lies to the District Judge from the decision of the Revenue Courts in certain suits of importance In the Central Provinces suits for arrears of rent and for ejectment on certain grounds are decided by the Civil Courts, but all proceedings in which the amount of rent payable is in question are dealt with on the revenue side In the non-scheduled districts of Bengal tenancy litigation is wholly transacted by the Civil Courts, but in the scheduled districts is committed to the revenue officials The ryotwari provinces as yet possess no separate tenancy law, and suits between landlord and tenant are included in the ordinary Civil Court litigation

Civil Court powers of District Magistrate

8 In the regulation provinces the Magistrates have nothing to do with the decision of civil suits, except in backward tracts of very small area In the non-regulation provinces it was formerly the practice for the district officer and his assistants to undertake the civil as well as the criminal and revenue court work This practice has been much changed in recent years Thus one of the objects of the scheme of 1833 for the reorganization of the civil administration in the Punjab was to relieve Deputy Commissioners to a great extent of their judicial work by increasing the number of District Judges and Subordinate Judges In 1900 Deputy Commissioners in the Punjab decided no original suits, Assistant Commissioners and Extra Assistant Commissioners decided only 6 9 per cent of the total and Tahsildars and Naib-Tahsildars 7 5 per cent

Deputy Commissioners, Assistant Commissioners, Extra Assistant Commissioners and Tahsildars in Oudh were relieved by Act XIII of 1879 of all civil judicial work

In the Central Provinces Act XVI of 1885 was passed with the object of paving the way for the gradual removal of civil judicial business from the magisterial and executive authorities Civil Judges and Munsifs were appointed In 1891 Judicial Assistants were appointed to the Commissioners who ceased from that time to exercise Civil Court powers These powers were formally withdrawn from Commissioners by Act IV of 1901 Deputy Commissioners disposed of only two original civil suits in 1899, and apparently of none in 1900 Assistant Commissioners and Extra Assistant Commissioners disposed of 11 3 per cent of the original cases in 1900, Naib-Tahsildars of 20 7 per cent and Tahsildars 22 6 per cent

In Lower Burma the township officer has in recent years been relieved of much original civil work by the creation of Civil Myooks, but throughout Upper Burma, and to a great extent in Assam (except the Sylhet District) Civil Court powers are exercised by the officers invested with criminal and revenue powers, and there is no separate Civil Court establishment

Thus in the Punjab the executive and magisterial establishments do a small, and in the Central Provinces a substantial, amount of the Civil Court work, while in Burma and Assam they do most of it

Executive powers of Magistrates in England

9 With reference to the contention of the memorialists that the combination of judicial with executive duties in the same officer violates the first principles of equity, I would observe that they seem to have ignored one important point, that they are asking for the introduction into India of a state of things which certainly does not exist in England, and probably does not exist in any other part of the world The separation of judicial and executive functions as it exists in England in the present day is of comparatively recent development Even in London there was no separation between the executive and judicial duties of paid justices until 1839 when these functions were divided by 2 and 3 Vict, cap 71, the judicial functions being given to Magistrates and the control of police to Commissioners The county and borough Magistrates, except those who are magistrates *ex-officio*, are appointed by the Lord Chancellor in the name of the Crown, and can be removed as easily as any ordinary Magistrate in India can be deprived of his power It was estimated by Mr Maitland in 1885 that of the committed cases one-half took place at county sessions, a quarter at borough sessions and only the balance at the assizes of sessions of the Central Criminal Court As, in addition to this the county and borough Magistrates disposed of practically all the trivial magisterial work and yet, on the other hand, in quarter sessions have jurisdiction in all kinds of cases, except capital offences, offences punishable at a first conviction with penal servitude for life, and a few of the more serious misdemeanours, it will be seen how large a share the magistracy takes in disposing of the criminal business of the country This fact, however, has not been thought in England sufficient to justify their exclusion from the performance of administrative duties. It is true that by quite recent legislation many of their administrative functions

have now been made over to other elective bodies, such as the County Council, Rural and Urban District Councils, and so on, but in the first place, it is not pretended that that step was taken in consequence of any inconvenience arising from the amalgamation of executive and judicial functions, and in the second place, it has not had that effect Of the administrative powers which the Justices had in addition to their judicial functions, prior to the change in legislation which instituted the County Councils, the first and most important as bearing on the consideration of the case, as it arises in India, was the authority which they held over the police The Justices in quarter sessions had the right to determine the number of constables to be employed, and could, with the consent of the Home Secretary, increase or diminish the number The Justices in quarter sessions also appointed the Chief Constables, who had the general disposition and government of the constables subject to the orders of quarter sessions and the Home Office regulations The Chief Constables also, with the approval of Petty Sessions, appointed, and it was for him at his pleasure to dismiss, his subordinates

It will thus be seen that up to quite a recent date, at any rate, the connection between the magistracy and the police and the authority of the former over the latter were of quite a marked character But, in addition to this authority, the Justices had, and, to a large extent they still have, other executive powers of the most miscellaneous and varied description Thus, as regards granting of licenses for public houses, the right to grant licenses or to transfer them was in the hands of the Justices So were the grant of licenses for pawn-brokers, keepers of billiard-rooms, stores of gunpowder and petroleum, agricultural gang-masters and baby farmers They were authorized to issue orders for cutting down trees which overhung highways, for destroying meat unfit for food, obscene books, dangerous dogs, to order the removal of corpses to the mortuary, of paupers to their place of settlement, and the closing of polluted water-supply They also appointed overseers of the poor settled the poor rates and jury list They heard complaints against local rating, they appointed county analysts and inspectors of weights and measures, and they had certain control over the highways and specially over country bridges They licensed play-houses, dancing-houses, and race-courses Income-tax commissioners are generally Justices of the Peace In these later days they have also to give certificates of exemption from compulsory vaccination It is true that many of these powers have been made over to the County Councils, but the intention in that was simply to place the local expenditure in the hands of elected representatives rather than in the hands of officials appointed by the Crown As a matter of fact an examination would show that the large majority of County Councillors are themselves Justices of Peace and that being so, the amalgamation of judicial and executive functions in the same hands has been left untouched Indeed it would not be possible to argue that the object of recent legislation was to separate the two because it is specially provided that some executive officials, such as Chairmen of County Councils Urban District Councils and Rural District Boards are to be Justices of the Peace during their term of office In the towns the police are more directly under the control of a Watch Committee of the Town Council, of whom, however, the Mayor is also the Chairman as he is the Chairman of the local Bench of Magistrates In the towns constables are appointed, dismissed and governed by this Watch Committee

As a matter of fact, historical connection between executive administration and the exercise of judicial functions has always been rather close in England This will be very well seen from the examples of the large towns No one would deny, for instance, that the Lord Mayor of London and the Sheriffs are executive officers, and in the past, of course, their executive authority was enormous Notwithstanding this they have always been included in the commissions of oyer and terminer and general jail delivery in the County of Middlesex and this has been kept up, as a form, even after the formation of the Central Criminal Court Nor is this an isolated instance, for in Bristol the Mayor, now the Lord Mayor, and the High Sheriff are joined with the Judges of Assizes in such commissions And not only this, but if the judicial officer, such as a Mayor, as Chairman of the local Bench Magistrates, neglects his executive functions he is guilty of misdemeanour and liable to imprisonment and fine at the information of the Attorney-General Thus, in 1780, the Lord Mayor of London was indicted for negligence in reading the Riot Act in putting down riots which occurred in London, and in 1832 Pinney, Mayor of Bristol, was similarly indicted for negligence in not putting down the reform riots in that town Certainly in England the responsibility for conserving the peace has never been divorced from the exercise of judicial power to the extent desired by the memorialists, and in the Local Government Act of 1888 all the powers of the justices over the police for the purpose of keeping the peace were expressly maintained intact

10 The main objections alleged against the present system seem to be that the Magistrate responsible for bringing offenders to justice can hardly be expected to go through the trial of an alleged offender in a case of serious crime with the perfectly open mind which the theory of administration of justice according to British ideas expects, that abstract justice consequently suffers at the hands of district officers who are influenced by consideration of administrative expediency, that the courts in India are not independent of the executive even in the exercise of the most purely judicial functions, that District Magistrates and some police officers, directly or indirectly, influence the Subordinate Magistrates in favour of convictions. that native Magistrates are apt to interpret directions, which if given to a European would leave his discretion entirely unfettered, as binding instructions not to be disobeyed, that native Magistrates owing to natual timidity and other reasons, frequently do not express their real opinion in cases sent up by the police, and frequently convict rather than acquit in deference to the views

Objection alleged against the present system

of the District Magistrates, and that Magistrates generally are ready to accept doubtful evidence and occasionally convict on less evidence than would satisfy a purely legal and detached mind The general consequence is said to be that there is a want of public confidence in the administration of justice in the Magistrates' Courts, and subsidiary defects in the present system are alleged to be the delays in the administration of justice, owing to the pressure of other work, and the inconvenience and hardship caused to parties and witnesses by attendance at the courts of Magistrates on tour

11 The objections that the present system involves delay and inconvenience to the people can be readily dealt with If unjustifiable delays occur—and no one will deny that they do in India as well as in England—this is not confined to those officers who exercise both judicial and executive functions, and is not so much a necessary incident of the system as the result of laziness on the part of individual officers No doubt Magistrates of districts and Subordinate Magistrates, with few exceptions, have too much to do but my experience is that with European Magistrates revenue case-work goes to the wall as compared with criminal case-work. With native Magistrates the case is often different, and the native mind finds it difficult to realize the importance of promptly disposing of cases in which accused persons have been sent up in police custody The evil results of constant postponements of criminal cases are, I believe, more noticeable in Bengal than elsewhere, and in that province the native Deputy Collectors have no revenue case-work, and nothing like the same miscellaneous revenue duties as in provinces in which there is a temporary settlement I think that there is no ground for believing that Magistrates employed in purely judicial duties, and subject only to the supervision of a Judge at some distance from them, the delays in disposing of criminal cases would be altogether removed or even materially decreased A valuable check which the District Magistrate can exercise over his Subordinate Magistrates is to examine the tickets of the under-trial prisoners when he makes the prescribed inspection of the district jail These show at a glance how Magistrates are postponing their cases This check would be available to the Sessions Judges, but engrossed as they are in judicial business they have not the same direct interest to attend to this matter that the Magistrates have, and would almost inevitably neglect it As to the inconvenience said to arise from Magistrates being on tour, it must, I think, be admitted that such inconvenience is occasionally caused, and I expect that in the Bombay Presidency, where every Assistant Magistrate and Collector is required to be in camp for seven months, it is greater than elsewhere It can, I believe, be reduced, if not entirely avoided, by proper management It ought never to be, and in my experience never has been, in any district in which I have served, the case that the criminal work of the city or town at head-quarters has had to be done by a Magistrate on tour in another part of the district Such an arrangement must lead to much hardship and inconvenience, but when a Subdivisional Magistrate is on tour in the parts of the district under his charge, it must surely be to the convenience of the witnesses and others to attend his court comparatively near their homes rather than to be called into the district head-quarters

And mine
DENZIL I[BBETSON]

12 In condemnation of the present system the memorialists have given in appendix B to the memorial summaries of various cases which in the opinion of the memorialists, illustrate in a striking way some of the dangers which arise from the present system These consist of 18 cases collected by the late Mr Monomohan Ghose The first took place in 1876 and the last in 1894, and only four of them occurred after 1890 The Bengal Government is, I think, justified in the assumption that Mr Monomohan Ghose made his collection as strong as possible, and in holding that the assertion that they are typical examples taken from a large number requires to be proved With an active native press and native bar in Bengal it is not likely that cases of real abuse escape the notice of the public or of the Government Considering that the cases cited by the late Mr Monomohan Ghose were collected during a period of nearly 20 years, and that these were taken from a province with a population of about 70 millions, they are not very numerous, but it must, I think, be admitted that some of them were bad cases

Alleged cases of abuse

Of the cases cited by Mr Monomohan Ghose several were noticed by the Executive Government, *viz* —

(*i*) *Case of Lal Chand Chowdry of Chittagong.*—Mr Monomohan Ghose referred to the action taken by the Government of Bengal and to the Government of India's views, but the latter are not completely stated by him The Governor General in Council expressed the gravest disapprobation of Mr Kirkwood's conduct and the opinion that he had been leniently dealt with His Excellency in Council did not consider it necessary to disturb the Lieutenant-Governor's orders or to press any further action against Mr Kirkwood, but said that he should be warned that any repetition of similar intemperate and insubordinate conduct, especially in connection with his judicial duties, would be most severely dealt with

(*ii*) *The Feroza cases* —Here, as Mr Monomohan Ghose showed, the Government interfered to get the injustice done remedied by the superior courts It did more than this, for the Lieutenant-Governor censured Mr Rattray, and ordered his reduction from the 5th grade of District Superintendents of Police to the top of the first grade of Assistant District Superintendents of Police, and his removal from the charge of the Chittagong District Mr Badcock was deprived

of his officiating appointment as a 2nd grade Joint Magistrate, and his promotion was stopped till he could establish a character for better judgment and discretion

(*xvi*) *The Monghyr case*—The Local Government ordered that, on his arrival in India after furlough, Mr Magrath should remain unemployed in the position of a Joint Magistrate until he furnished a full explanation (Our records do not show what subsequently happened as regards Mr Magrath) Mr Harris was severely censured and removed from the charge of a subdivision The Government of India approved of the substance of the orders passed by the Local Government

(*xiv*) *The Rungpur Deer case*—Mr Monomohan Ghose has given extracts from the orders of the Government of Bengal dealing with the officials who misbehaved in this case

(*xv*) *The Jamalpur Mela case*—Mr Monomohan Ghose has quoted the orders passed by Sir Steuart Bayley in this case The Government of India said that the Lieutenant-Governor was justified in transferring Mr Glazier from Mymensingh, and expressed the opinion, that Mr Glazier was, in the Lieutenant-Governor's opinion, otherwise qualified for higher posts in the police service, the errors committed by him were not of so grave a nature as to call for an order debarring him from all hope of future promotion The Secretary of State agreed with the Government of India

(*xvi*) *The Mymensingh case*—Mr Monomohan Ghose has noticed that the Lieutenant-Governor censured Mr Phillips This case led to expressions of opinion by Lords Kimberley and Cross in the House of Lords regarding the union of executive and judicial functions

(*xx*) *The Khulna case*—In this case Sir Charles Elliot censured Mr Beatson-Bell for his hotheadedness The Government of India forwarded the papers to the Secretary of State with the remark that they did not think that the circumstances of the case were such as to require that any further notice should be taken of Mr Bell's conduct

The Government of India asked the Local Governments and the High Court at Calcutta to furnish a definite statement of all cases of abuse that had come to their notice in the past five years, and to show in what respect abuse or miscarriage of justice has occurred The replies on this point disclose very little reason for attacking the present system on the ground that it leads to miscarriage of justice

Madras—One case has come to the notice of the Madras Government and the Madras High Court in the past five years, in which the combination of functions led to the introduction of executive considerations into the disposal of a judicial inquiry This was no doubt a bad case A second-class Magistrate introduced into a simple judicial inquiry a general discussion as to the manner in which a large distillery was conducted The accused was, in consequence, subjected to inconvenience and hardship, and the District Magistrate failed to take notice of the impropriety of the Sub-Magistrate The Sessions Judge acquitted the man on appeal, and, on an appeal against this acquittal, the High Court concurred with the Sessions Judge Mr Justice Shepherd, himself a supporter of separation, says "I do not suppose that many cases such as those adduced by Mr Monomohan Ghose could be adduced by any Madras witness for in this Presidency the confusion of the functions of police-officer, prosecutor and judge does not go the length which it apparently reaches in Bengal"

Bombay—The cases of abuse cited are as follows —

(1) That quoted by Sir Lawrence Jenkins In this case a military officer, who had been given first-class magisterial powers while temporarily employed on plague duty, convicted a man for disobeying an order issued by himself The military officer had been invested with magisterial powers to meet an emergency under the Epidemic Diseases Act This case is, after all, not a very important one, since the man was only fined Rs 40, which sum was refunded owing to the order on appeal, and it cannot be regarded as illustrative of what is done under ordinary circumstances

(2) Fourteen cases of abuse are returned as having come to the notice of the High Court in the past five years They are examined in paragraph 9 of the Bombay Government's letter of 24th December 1900 It is clear that in cases 1, 2, 3, 7, 8, 10, 11, 14, there was no abuse arising from the union of judicial and executive functions The fault was in each case a failure to appreciate the evidence or to interpret the law correctly Cases 4, 9 and 13 were cases of conviction under the Epidemic Diseases Act, in two of them the Magistrate convicted persons for failure to obey the rules under the Act whom the High Court found not to be liable to observe them; in the third it held that the accused had no knowledge of the rule, for disobeying which he had been convicted, and acquitted him because he obeyed it as soon as it was brought

While the other five are trifling, and the connection with the present system often exceedingly remote

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to his notice The Magistrate does not seem to have been wrong in the last case, in fact the judgment of the High Court seems to conflict with a well-known legal maxim There remain two cases, *viz*, (6) in which a District Magistrate directed that a Mamlatdar, who had been discharged by one Magistrate, should be tried by another The High Court was probably right in quashing this order on its examination of the facts, on the ground that there was no fresh evidence At the same time, although his action may have been unwise, no illegality was committed by the District Magistrate, since a discharge does not operate like an acquittal to stay further proceedings The last case is that of a Subordinate Magistrate who imposed a petty fine for disobedience of an order given by himself This was clearly illegal, but was promptly brought to the notice of the High Court by the District Magistrate The sum total of abuse brought out in the statement furnished by the High Court at Bombay is infinitesimal, and cannot be held to weigh against the observation of Mr Justice Russel to the following effect - "Speaking from my experience as a barrister who practised (with but few exceptions in mofusal cases) for over twenty years in the city of Bombay, I cannot say that I ever met with a case in which the combination of executive and judicial functions in the same hands led to abuse" Even Mr Ranade admitted that the District Magistrates had seldom been found fault with for exercising their judicial powers in subordination to their executive functions Mr Justice Badrudin Tyabji made some general statements which he was quite unable to substantiate when called upon to do so

(3) Mr Dayaram Gidumal, as District and Sessions Judge of Shikarpur, has put forward three cases The first occurred in 1866, the action of the District Magistrate in this case was reprehensible, but the case is 35 years old In the second case the Assistant Collector was supported by the Sessions Judge in his decision, at the same time the account given of the former's actions shows that it was not quite judicial The third case merely shows that the police inspector in question abused his authority as a police-officer, and has no bearing whatever on the question of the union of executive and judicial functions

Not one of the cases cited in the statement (page 134 of papers from Bombay) furnished by Mr Dayaram Gidumal, as Officiating Judicial Commissioner in Sind on November 4th, 1900, seems to have the smallest bearing on abuses arising from the union of judicial and executive functions

Bengal—The Lieutenant-Governor has heard of two cases—I suppose the Chupra case and Mr Maguire's case The High Court has furnished no figures on the ground that the compilation of a statement would entail a search which would occupy a substantial time This ground for not complying with the request of the Government of India in itself shows that there cannot have been many serious cases of abuse. had there been, they could have been readily remembered and traced Sir Henry Prinsep (the oldest Judge on the Indian Bench) thinks that cases in which the union of offices leads to abuse are "comparatively rare, and, I should say, less frequent than they were fifteen or twenty years ago"

No *Judicial* element entered into Maguire's case which is therefore not in point

DENZIL I[BBETSON]

The memorials forwarded from different associations by the Bengal Government in favour of separation only cite one case of abuse outside Bengal itself, *viz*, the Baladhan murder case (Assam) In this case seven men were convicted, four being sentenced to death and three to transportation for life The High Court quashed the sentences and acquitted the accused I do not see how this establishes a case of abuse due to the union of executive and judicial functions

The United Provinces—The Acting Chief Justice (Mr Knox) wrote "So far as these provinces are concerned and so far as my experience goes, I cannot give one single instance in which the combination under consideration has actually led to abuse"

But see the Chief Justice's opinion on them, quoted in paragraph 6 of the United Provinces letter

Mr Fox, one of the Sessions Judges in the United Provinces, cited six cases of abuse

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(1) In this case the Magistrate is said from Mr Fox's recollection to have described the same witness as respectable and of bad character respectively in two cases in one of which he was a witness for the Crown and in one for the defence As Mr Knox points out, assuming Mr Fox's recollection to be correct, it is not shown than any actual harm was caused, the case is 9 years old

(2) In the second case the High Court Judge (Mr Knox) reduced the sentence, but thought the Magistrate's action open to no criticism

(3) In the third case a policeman, after having been acquitted of abduction by the Sessions Court, was charged under the Police Act with having failed to report the arrival at his house of the girl whom he was charged with abducting, and sentenced to 28 days' imprisonment I do not understand Mr Knox's remark that the error was the error of an executive not of a judicial officer, the Magistrate clearly should not have convicted, and as a matter of fact the High Court quashed the conviction The case was not one of much importance, but it is not a satisfactory one

I should like to hear what they have to say
DENZIL IBBETSON]

(4) The fourth case was very similar to the third, and the Magistrate of the District and the Sub-divisional Magistrate were, in my opinion, both to blame

(5) In this case the Deputy Magistrate appears to have said in this judgement that, as he had much to do with the executive line, he could not generally act upon the principle of giving the doubt to the accused I fear that the Deputy Magistrate decided this case with a view to his statistical statements, it is one of the curses of present arrangements that Subordinate Magistrates think that they will be judged—and as a fact they are often so judged—by their statistical returns

(6) In this case there was a mistake made as to the law, no interference of the executive with the judicial

In the case cited by Saiyid Akbar Hussain (page 227 of enclosures from the United Provinces Government), there was no suggestion that the Magistrate of the district interfered with the discretion of the Deputy Magistrate, or that he even knew of the case Some subordinate police officer appears to have hinted to the Deputy Magistrate that the District Superintendent of Police wanted a conviction—the case does not bear on abuse arising from the union of judicial and executive functions

Mr. Alexander, Commissioner of the Allahabad Division (page 46 of enclosures to the letter from the Government of the United Provinces), cites a case in which a Deputy Magistrate at Jhansi convicted the accused in a doubtful case on the ground that, being an executive officer, he must convict rather than acquit, but, according to Mr Alexander's opinion, there was strong suspicion against the accused. Still he ought to have been given the benefit of the doubt

This is Mr Fox's No 5)
DENZIL IBBETSON].

Mr Feraid, Magistrate of Allahabad (page 48 of enclosures to the United Provinces Government's letter), mentions two cases (1) the Khuldabad Mandi case the District Magistrate did not believe in the truth of the case The Joint Magistrate, however, convicted and criticised the action of the District Magistrate The latter was wrong to express, as Collector of the District, an opinion on the case, but the expression of his opinion did not affect the action of the Joint Magistrate (2) The case of Prithipal Singh In this case the Magistrate of the District directed that proceedings should be taken against Prithipal Singh, and, in doing so, went beyond his powers in directing the Deputy Magistrate to exercise care in the selection of sureties, thus assuming that the Deputy Magistrate would demand security, whereas the Deputy Magistrate did not do so No harm was done

Oudh—One case only and that of trivial importance, which led to no injustice, is cited by the Judicial Commissioner of Oudh In a criminal case against Thakur Chandrika Baksh Singh, the District Magistrate wrote a letter to the Deputy Magistrate trying the case which was calculated to influence and intended to influence the decision of the case The District Magistrate subsequently explained that he had no intention of influencing the Court but, having visited the spot, gave the Court the result of his inspection, as he thought that it might be of use to the trying Magistrate He should have appeared as a witness

The late Lieutenant-Governor of the United Provinces observed "A few other instances of irregularities of some kind have been brought to notice in the 'voluminous correspondence which the discussion has produced, but it may be correctly said that they are very few and that in no case was there any scandalous abuse, the majority are of trivial importance, and many of the instances quoted are noticeable chiefly as showing the refusal of judicial officers to submit to even the appearance of dictation from the executive authority, though that authority was their official superior"

The late Sir Arthur Strachey wrote —"During the whole of my experience at the bar and on the Bench I can remember no instance of abuse resulting from the combination of these functions in the same hands, and my experience is from 1883 to 1901 I do not know of any practical evil to be remedied I believe that no such practical evil exists"

The Hon'ble Rai Sir Ram Bahadur, Member of His Excellency's Council, who is a pleader and in favour of separation, observes —"I cannot give any instance from my direct personal experience in which the union of two functions has given rise to any serious mischief or hardship"

Punjab—We have just had a bad case from the Punjab, *viz*, Captain Elliott's Apart from that case three cases came to notice in the province in the past five years The same officer (a military civilian) was implicated in all three cases in the first as Sub-divisional Magistrate, in the other two as District Magistrate I have no hesitation in describing his conduct as scandalous His judgment in the first case, in which he convicted a man for perjury committed before himself: (1) when he had no jurisdiction to try the case, and (2) when there was no evidence to prove the charge, was upset by the Chief Court on revision The Sessions judge reversed the other two judgments on appeal. In the first of these he had, as District Magistrate, withdrawn the case from another Magistrate, after the witnesses for the prosecution had been examined, and the accused charged He himself charged the accused on seven different counts in one case (a course which every Magistrate should know is contrary to law, but which was apparently unknown to a barrister Presidency Magistrate at Madras and

to Mr Justice Boddam, judging from their proceedings in the Subramania Aiyar case), and based his judgment partly on information not in the form of evidence on the record In the third case he sentenced a lambardar, who did not provide him with carts, to two months' imprisonment for gross impertinence and insubordination, and neglect of the duty of a lambardar The sentence purported to be given under section 44 of the Chowkidari Rules under the Punjab Laws Act His action was most perverse, and the Lieutenant-Governor reduced his powers on account of his action in the first case, and in connection with the second reduced him from the position of officiating Deputy Commissioner to Assistant Commissioner with powers of a second class Magistrate He deserved to be removed from civil employ, The Chief Judge of the Chief Court (Mr W O Clark) remarks "I am ready to admit that abuses of the kind do and will occur, but I do not think that they are frequent, and I think that they are generally brought to notice and punished" Mr Justice Chatterji observes:— "I am not prepared to say that there have been no similar instances in the Punjab, though probably they have not been glaring ones I have also sufficient confidence in the impartiality and fairmindedness of the members of the service, both Imperial and Provincial, to believe that their number has not been considerable"

Burma—The Burma Government brings to notice one flagrant case, the only one of which there was any record in the Secretariat, which occurred in Thaton in January 1900 The case arose out of an investigation made by the District Magistrate into serious malpractices in connection with grants of land Certain complaints were made while he was conducting his executive inquiry and he himself tried the case against the native Sub-divisional officer and his clerk He had in his investigation formed an opinion as to their guilt, and they consequently did not have a fair trial The Magistrate's action in his conduct of the trial was partial, and the sentence, which he gave was excessive and vindictive The terms of section 556, Criminal Procedure Code, should have prevented his trying the case at all The sentences were revised on appeal

The Judicial Commissioner of Upper Burma writes:—"No instance of abuse has come to my notice during the two years of my appointment as Judicial Commissioner I have caused the appellate revisional records of this court for the past five years to be examined and no case of the kind has come to light"

The Chief Judge of the Chief Court writes—"Search has been made in the Judicial Commissioner's and recorder's Courts for cases disclosing instances of abuse arising from the union of executive and judicial functions, but none have been found A case was before me a few weeks ago in which a Township Magistrate tried and fined rather heavily a cartman who had failed when required, under the village law, by the headman to supply a cart for this officer's own use No doubt the severity of the sentence may have been due to the Magistrate being concerned, and to his unconsciously magnifying the offence, but the law (section 556, Criminal Procedure Code) should have prevented the case from being tried by this Magistrate" The case was brought by the District Magistrate before the Chief Court on revision Mr Justice Fox, who was Government Advocate for 17 years, writes—"I cannot call to mind any case of actual abuse of judicial powers or miscarriage of justice within the past five years, which could be in any way attributed to the combination of executive and judicial functions in the same officer

Central Provinces—Neither the Chief Commissioner nor the Commissioner consulted by him have any instances of abuse to cite The Judicial Commissioner (Mr Ismay) says—"I should be very averse to think that the present system (save in very exceptional instances) has led to any actual abuse, but I know from practical experience how hard it is to dissociate from one's mind knowledge acquired outside the record of a case * * * That the District Magistrate brings any official influence to bear upon Subordinate Magistrates I should hesitate to believe, but at the same time there is no shutting one's eyes to the fact that the present system is open to criticism"

Mr Ismay did not give any specific instances of abuse

Speaking from Bengal experience

DEVAN I[BBETSON]

Assam—Mr Cotton gives no instances of abuse, but he makes the following remarks—

"To the first of these questions I have no hesitation in replying that the combination of executive and judicial functions in the same hands does actually lead to abuse, and, if it were necessary to do so, I could furnish ample proof of this But to compile such evidence would be a most distasteful task, and I have no desire to place on record my own observations of abuse of power on the part of Magistrates I cannot, however, imagine that serious doubt can exist in the mind of any one who is acquainted with the practical administration of justice in India that the combination of functions does actually lead to practical abuse Mr Monomohan Ghose's twenty cases are typical of others, and the experience of every Judge, Magistrate and Barrister could add to their number, but as they stand, they are enough to show that mischief has resulted It is hardly necessary to refer to the recent Chupra case, the facts of which were published by the Government of India in the *Gazette* It must be remembered also that a very small proportion of cases in which interference with the Subordinate Courts has been exercised by the District Officer or other superior executive authority comes to notice, for discreet officers will always keep their interference and control in the background The fact remains that, however indirectly the power may be exercised, the union of police, prosecutor and judge in the same hands leads to results which are as objectionable in practice as they are anomalous in theory There can be no other answer to the first question than that there is a practical evil to be remedied."

This expression of opinion, unaccompanied by any statement of facts, on the part of Mr Cotton, does not appear to me to be of any great value Looking generally at the replies of local Governments and the highest judicial courts to the question put to them as to actual

cases of abuse, it appears to me that the facts show that cases of serious abuse are marvellously few, and, taking into consideration the general belief, which appears to be well-founded, that, whatever the system be, some cases of abuse must occasionally occur, it seems to me to be a legitimate conclusion that the amount of abuse which arises under the present system is not sufficient to demand the substitution of another system for it

Public and official opinion on the subject

13 It is alleged that the present system is condemned not only by the general voice of public opinion in India, but also by Anglo-Indian officers and by high legal authorities This statement is not confirmed by the replies of local Governments

I make the figures, 14 for total, and 4 for partial, separation, 12 against separation, and 2 doubtful

Denzil I[bbetson]

Of the 31 High Court Judges consulted 19 were in favour of complete separation, three in favour of partial separation limited to subordinate officers, and nine in favour of leaving matters as they are Among those in favour of complete separation are two Chief Justices (Calcutta and Madras), seven Barrister-Judges, six Civilian Judges, and four Native Judges Among those against a change of system were one Chief Justice (the late Sir Arthur Strachey), one Barrister-Judge, and seven Civilian Judges Among those in favour of separation limited to subordinate officials were one Chief Justice (Sir Lawrence Jenkins), one Native Judge (the late Mr Ranade), and one Civilian Judge

Of the nine Judges consulted in Chief Courts two (one Barrister and one Native) were in favour of separation, and seven (one Barrister and six Civilians) against it

Of five Judicial Commissioners three were in favour of the present system, one in favour of separation, and one in favour of separation in the case of subordinate officers

Out of 19 District Judges nine have expressed themselves in favour of separation, and ten against it

The opinion of executive officers consulted has naturally been more generally against the proposed change None of the nine members of the Boards of Revenue, none of the Financial Commissioners, and none of the 20 Magistrate-Collectors consulted are in favour of complete separation, and only one out of 29 Commissioners A few of these officials are in favour of separation in the case of subordinate officers Of the local Governments and Administrations Mr Cotton stands alone in advocating separation

He was not consulted but volunteered an opinion

Denzil I[bbetson]

Of the non-officials consulted, two Europeans (Mr J Monro, C B, a retired Civilian, and Mr E Macnaghten, General Secretary of the Behar Indigo Planters' Association) were against separation, and one (Mr E W Parker, lately Legal Remembrancer in the Punjab) in favour of partial separation

Of the native non-officials consulted 15 (all in the United Provinces) were against separation, and eight (seven in the United Provinces and one in the Punjab) in favour of it No opinions of native non-officials were furnished except from the United Provinces and the Punjab Speaking generally of public opinion, Sir Antony MacDonnell said, "Apart from conversations with the native gentlemen who support the National Congress, and apart from occasional discussions in some philo-Congress newspapers, in which the separation of judicial from executive functions is supported on theoretical grounds, the Lieutenant-Governor, during five years of office, has seen no reason whatever to think that such separation commends itself to public opinion in these provinces" Pandit Jwala Prasad, a Collector in the United Provinces, wrote "The masses, I can safely assert, have no conception even as to what the terms executive and judicial mean and therefore to assert that they are agitating for a reform which they cannot even grasp is absurd . There are two classes among the Indians of the present day who may be characterized as the direct resultants of the cheap and liberal education that the British Government has given us, *viz*, (1) lawyers and (2) graduates and other alumni of the several Universities These are the two classes that advocate the introduction of the scheme now under consideration" Kunwar Bharat Singh, a District Judge in the United Provinces, observed, "From the people's point of view, I must admit that I never heard any one wishing for such a separation" Raja Shyam Sinha of Tajpur, who has lived several years in England, among other remarks condemning the proposed change, said: "The change so strongly advocated by most eminent and prominent gentlemen, both European and Indian, may be perfectly good in theory but hardly so in practice"

Mr Alexander, Commissioner of Allahabad, observed —

"I have spoken to several native gentlemen of influence, and though I think that, read between the lines, their opinions are usually in favour of the proposal to separate the executive and judicial, they are unable to give me any instances of actual injustice or other evil effects resulting from the present conditions"

Mr Darrah, Commissioner of Gorakhpur, wrote —

"Lastly, there is the fact, as I maintain it was, that the great bulk of the people do not want the change at all . . . Out of the 68 men who were consulted in this division with a view to this inquiry, only six were in favour of the change proposed, and of these six one had never heard of the subject till the Collector explained it to him and asked his opinion A large proportion heard of the matter first when questioned about it in connection with this inquiry"

Mr R Scott, Judicial Commissioner in Oudh, said —

"The mass of the people have, in my opinion, absolute confidence in the District Magistrates and believe their cases will be tried carefully and impartially by Native Magistrates also so long as the latter are subordinate and under the control and supervision of the District Magistrate, but I do not believe that they would have equal confidence if that control and supervision were withdrawn or replaced by anything less effective"

The opinion of Mr Monro, himself formerly Inspector-General of Police in Bengal, and subsequently Assistant and Chief Commissioner of Police in London, who has for the last ten years worked as a missionary among the people of Bengal, seems to me to be of great value He says "The people at large—the masses—the millions for whose benefit we profess to govern the country, certainly have no desire, and evince no desire, for such a change"

Colonel Montgomery, a very experienced Commissioner in the Punjab, writes —

"I can confidently say that among the people of the province there is no demand for a separation of executive and judicial functions On the contrary, I believe that if a plebiscite were taken, the overwhelming majority would be for the present arrangement In this connection I may mention that one of the commonest requests made to me when I was in charge of a district was that I would try a particular case myself or send it to one of my English assistants for trial"

Sir Frederic Fryer's opinion is to the following effect "It is necessary that the head of the district should possess extensive powers and the divorce of judicial from executive functions would offend the ideas of the people, would weaken the administration, and would be an unmixed evil" Mr Fraser expressed the opinion that the change would be unpopular with people in the interior of the districts

My own experience leads me to believe that this view is absolutely correct Nothing is more troublesome to the ordinary peasant than not having one individual officer to go to when he has any grievance to remedy or any request to prefer Probably educated opinion in Madras, Bombay and Bengal, particularly in the latter province, generally takes the other view, and is in opposition to the feelings of the mass of the country The National Congress first passed a resolution in favour of the separation of executive and judicial functions at its second meeting held at Calcutta in December 1886 It has been renewed ever since, and one of its objects undoubtedly is to secure what Mr Cotton considers to be a desirable thing, *viz*, the increase in the number of native Judicial officers—a result which he "would welcome in the interests of both efficiency and economy" I am far from saying that an Indian Civil Servant makes an ideal Judge In a province like Bengal, where many of the subordinate judiciary are highly trained in civil law, and where the native bar contains a large number of clever and well-trained lawyers, I doubt whether, with their present training, some of the civilian judges are up to the mark Unfortunately, too, the antagonism between the executive and judicial branches of the service, fostered in the past by the local Government and the High Court alike, has deterred most of the best men from electing for judicial work But it does not seem impossible to improve the training of the judges in Bengal and I would urge that the object should be not to make over all the judgeships to natives, but to improve the qualifications of Civilians as Judges It would not be injurious to the Civil Service in the long run if it were recruited only to fill executive posts, but it would, in my opinion, be very injurious to the country This has been well put by Sir Alfred Lyall, who cannot be charged with having been prejudiced in favour of the Civil Service, in his private note printed at page 157 of Home Department Public Proceedings for October 1888, Nos 188-223 He argued that the position of the judicial courts in India is exceptionally strong, and that they can exercise a very stringent control over the ordinary proceedings of executive officers He anticipated that, if natives of India were to become decidedly predominant in the judicial branch, they would some day become "more powerful as judges and less under control than as revenue officers and in miscellaneous executive appointments more likely to be influenced by any popular or political movements, and more prone to take up, in regard to the executive authority, an attitude that may under certain circumstances be highly inconvenient"

Arguments in favour of the present system

14 In favour of the existing system it may be urged that the amount of abuse disclosed is certainly not more than might be expected under any system, that as explained in paragraph 17 of this note special safeguards have been devised in order to prevent abuse, that no practical scheme has yet been devised to take its place, that the people in the districts do not display a want of confidence in the existing Magistrate's courts, that they thoroughly appreciate a system of rule by one man, and dislike an arrangement under which they have a different authority to refer to in almost every act of their daily life, that an executive officer with magisterial powers can exercise a far more efficient supervision over his subordinates than without them, and that therefore, under present arrangements, the people are secured against oppression on the part of subordinate officials, that law and order cannot be maintained in India without concentrating responsibility in the executive head of the districts, that a change would mean a weakening in the control over the police, that the withdrawal of the magistracy from all interest in the detection of grave crime would be very harmful to the comfort and security of the people, that a stationary Judge, with no time for personal inspection and knowing his subordinates only through the records which come before him, cannot exercise an effective supervision over the inferior courts that a change would result in a general want of touch between the officials and the people, and that a purely legal training is not so necessary in a Magistrate in a country ruled by foreigners as a knowledge of the habits, customs and language of the people.

15 It is not difficult to establish the position that a strong executive is required to keep even the more pacific portions of British India in order The riots and disturbances, which have occurred in the latter country in recent years, are in themselves sufficient to show how unsafe it is to infer that the arrangements which may be suitable to England will be equally suitable in India Throughout the country there are predatory tribes and castes, and some of the great cities contain very turbulent elements The people, docile enough as a rule, are liable to fierce bursts of passion The causes which move them are sometimes political, sometimes religious, sometimes agrarian, sometimes a combination of more than one of these Sir Charles Crosthwaite observed in giving evidence before the Royal Commission on Opium, that popular feeling in India is much more felt than it is heard The executive in this country constantly finds itself suddenly face to face with a combination against authority of persons for the time being forgetful of all restraint and anxious to assert their resentment of it by acts of the most violent and determined character There is an ignorant mob, subject to panic, agitated by every rumour, easily led astray, and readily influenced by religious or other excitement, often the tool of interested parties who circulate scares for their own purposes When once it has been energized into action the authorities can expect no assistance from the general public If it neither actively assists nor gives the breakers of the law its sympathy it looks on with apathy determined not to involve itself either by giving information of what it sees or taking action to prevent what it knows to be imminent

Instances of violent conduct in recent years

The Hindus in British India number 158¼ millions and the Muhammadans 53¾ millions The existence side by side in every province of these two races, their traditional hostility to one another now again stimulated into overt breaches of the law, renders it necessary to provide an executive with a heavy hand to keep the peace between them Excluding the Presidency towns of Calcutta, Bombay and Rangoon for the moment, I may note that, as reported to the Secretary of State in the Home Department Despatch of 26th September 1894, there were during the five years ending with 1893 no less than 881 Hindu-Muhammadan riots In this period there was great activity in propagating and promoting respect for the doctrines and observances of Hinduism and a vigorous propaganda against kine-killing was inaugurated These riots occurred in every province in British India, except Assam Twenty persons were killed and 243 were wounded, mainly by the rioters

The Presidency towns were also the scenes of conflicts between these two races In Calcutta in 1891, a dispute arose owing to a Hindu having obtained a decree for the ejectment from his land of the Muhammadan occupier of a tiled hut which had been used for some years as a place of religious worship The decree was correct, and the defendant did not appeal in stay of execution On the night before the decree became absolute the Muhammadans secretly arranged to resist its execution A mob of 200 Muhammadans assembled the following day, and beat the police off three times (twice under the Commissioner and Deputy Commissioner) The police succeeded in dispersing them at the fourth attack Two rioters were killed and 38 wounded and 21 passers by were injured One native constable was killed, 6 European police severely and 12 slightly injured, 12 native officers and men severely and 39 slightly injured

On 25th June 1893 a dispute took place in Rangoon as to the right of the Muhammadans to slaughter a cow in the vicinity of a Hindu temple The District Magistrate forbade the slaughter in this particular neighbourhood and posted police to insure the order being obeyed A series of riots between Hindus and Muhammadans followed, and, after two days' desultory rioting, the police were on the third day attacked by the Muhammadans Fighting continued for half an hour, the police with difficulty held their own and were compelled to fire The Commissioner and District Magistrate were injured, 15 of the rioters killed, 18 wounded, 107 of the military police were wounded

In August 1893 disturbances took place in Bombay between the Hindus and Muhammadans which lasted for 48 hours from 2 P M on the 11th to 2 P M on the 13th Three squadrons of cavalry, a European and Native regiment from Poona and armed police from the mufassil had to be sent to Bombay to assist in its suppression The outbreak was a very serious and uncontrollable character The Muhammadans and Hindus attacked each other all over the town, murdering freely Eighty were killed, 530 wounded, 1,500 arrested Many mosques and temples were sacked in different quarters of the city The number of rounds fired at the mob was very small, and nearly all the deaths and injuries were due to the people fighting among themselves

In Calcutta, in 1897, a very serious riot was caused again in connection with the delivery of possession to the Tagore Estate, in execution of a decree, of a piece of land at Talla containing a hut, which was alleged to be a mosque The riots were almost all confined to the northern portion of the town The disturbance lasted nearly 36 hours, from 30th June at dawn to 3 P M on July 1st A guard of 25 police under a European officer at the pumping-station at Talla was besieged for some hours by the mob The Military and Calcutta Light Horse were called out The police fired on the mob at one place Eleven rioters were reported to have been killed and 20 wounded, 34 police officers and men were wounded (12 severely)

On 9th March 1898 a serious riot took place in Bombay on account of the attempted removal of a supposed plague patient to hospital At the original outbreak 4 men were killed 3 seriously wounded, 3 police officers and the Parsi Presidency Magistrate were injured A second outbreak took place in an adjoining part of town and promiscuous rioting in several

streets Two rioters were killed by the police, 2 unoffending and unarmed British soldiers done to death and another injured by the mob Several private Europeans were attacked, and 5 European police officers injured The total results were 11 rioters killed, 13 severely injured, 2 British soldiers killed, 1 seriously injured, 6 European and 5 native police-officers severely injured, 21 European and 10 native officers slightly injured, 5 seriously, 23 of the general public (14 being Europeans) seriously injured by rioters and 30 slightly injured The police fired once at the Magistrate's order, killing 5 persons

The above facts show that in the most civilized places in India the executive has to be prepared to act at a moment's notice against mobs with the most turbulent instincts Although of recent years there has been so much trouble between Muhammadans and Hindus there have been occasional riots though not of great importance It is impossible to tell when and how influences may be exerted in either race which would lead to fresh outbreaks between them.

Assam, which had escaped the Hindu-Muhammadan riots, was the scene of serious agrarian riots in 1894 The riots took place in the Kamrup and Darrang Districts and the cause was the enhancement of the assessment The resistance was of an organized character, the riots taking place at a number of places The Deputy Commissioner was attacked in the Darrang District, and had to order the police to fire on the mob in order to preserve the lives of his party Twelve rioters were killed

Religious antagonism not between Hindu and Muhammadans has more than once led to serious trouble in the Madras Presidency The Shanars (the toddy-making caste) have been doing all they can to better themselves in the world, and have incurred the jealousy of other castes In 1895 there was a riot at Kalugumalai in the Tinnevelly District when the Shanars had become Roman Catholics The Shanars attacked on 7th April 1895 a car being drawn past the church on the Car festival, stabbed the manager of the local zamindar and the village Magistrate of the neighbouring village, both of whom died, and 3 others (of whom 1 died) The church was then burnt by the Hindus, many houses were burnt and 7 persons burnt in the fire, 36 Shanars and 5 men of other castes were wounded in the fight Again, in 1899, there was a very general disturbance in the Tinnevelly and Madura Districts due to the hostility between the Shanars and the Maravars (reported to Secretary of State in Despatch of 22nd February 1900) On 26th April 1899 the Shanars of Shivakasi (10,000) assisted by some Muhammadans (1,500) attacked and destroyed the Maravar quarter of the town (about 500 persons) A large party of Maravars from different parts retaliated on 6th June by attacking Shivakasi Eighteen men were killed and a large number wounded of whom three died at once and 886 houses were destroyed There were frequent dakaits, murders, and burning of villages throughout the district There had been a bad state of feeling in Shivakasi with a riot in 1898 (August) and also at Kumugulai since December 1894 In both cases the Government of India blamed the District Magistrate for not having taken preventive measures to stop the riot, but, without the powers which he now possesses, no District Magistrate could possibly have been successful in doing so

Another form of trouble to repress which a strong executive is required is the rising of fanatical classes or aboriginal and hill tribes The Mapillas in the Malabar District went out in 1894 and again in 1896 In the latter year, after committing two murders and destroying some temples, a gang took up their position in the Majheri temple There they were attacked and all (90 in number) were either shot by the troops or killed by their own side after they had been wounded

The Kojas, a hill tribe in the Godavari District, went out in July 1897, partly owing to bad seasons, and they looted several villages, 3 of them were shot by police and 100 captured. The military were called out but were not required to act

The Kolis in the Kaira District went out in January 1898 They drove off the Mamlatdar and a small force of police A Koli Jogi preached end of British Raj and non-payment of taxes One constable and one Koli were killed Troops were called out from Ahmedabad The affair died out with the arrest of the religious leader

In the hills in the Saluru taluka of the Vizianagram District, at the end of 1899, a man claiming to be an incarnation of the Deity raised a following, murdered a head constable and a constable, formed a camp in the hills of several thousands and charged the police frequently His camp was attacked by the District Magistrate and 11 rioters were killed, and 16 wounded, two police-officers and one constable were injured

Lastly, the Munda revolt took place in December 1899, partly the result of agrarian troubles They were led by Birsa, a prophet, who acquired the reputation of being the incarnation of the Deity They were guilty of acts of incendiarism and murderous assaults on Native Christians and others The insurgents killed a constable and four chaukidars and a European timber contractor and his servant and also burnt a police-station, killing a constable The military were called out and the outbreaks thus suppressed

The disturbances at different places in consequence of the enforcement of plague rules afford another illustration of the need that the executive should be armed with powers which are quite unnecessary in England, but which have led to the combination of executive and judicial functions in the Resident Magistrates in Ireland Besides the riot in Bombay, in March 1898, there was the organized murder of Mr Rand in May 1897, the burning of the plague camps at Sinnar (in the Nasik District) followed by the murder of the native Chairman of the Plague Committee and a hospital assistant, the wrecking of the post-office and the cutting of the telegraph wires, the attack on the police at Gaihshankar in April 1898, when the police sent to carry out plague measures were attacked by rioters and 26 of them injured, and they had to fire, killing 9 and wounding 27, the outbreak at Ghattal near Midnapur,

where owing to an attempt to erect a plague hut the police were attacked by 2,000 persons in May 1898 and had to fire, killing four and wounding ten, the outbreak at Cawnpore in April 1900 when the plague camp was burnt and five police men and one tahsil chaprasi were burnt, and the troubles of last year in the Sialkot District

The conclusion to be drawn from this statement of instances in which the people have taken the law into their own hands of recent years is that it is absolutely essential to retain the preventive powers given to the District Magistrates by Chapters VIII—XII of the Criminal Procedure Code The power to maintain law and order must be in the hands of a strong executive authority, and to be effective in the present condition of affairs in India, this authority must be combined with judicial power

Alternative scheme suggested

16 Both Lord Kimberly and Lord Cross stated in the House of Lords that the separation of judicial and executive functions would involve much expenditure, the former saying that it involved a doubling of establishments The memorialists contend that the best answer to this objection is to be found in Mr Rumesh Chunder Dutt's scheme for Bengal, and that it is not necessary to argue either (1) that any expense which the separation of judicial from executive duties might involve would be borne—and borne cheerfully—by the people of India or (2) that it might well be met by economies in other directions The memorialists claim that Mr Dutt has shown that the separation might be effected by a simple rearrangement of the existing staff, without any additional expense whatsoever The Bengal Government was specially asked to scrutinize the contention that the change could be effected without any additional expenditure, and, should this be found not be the case, to estimate the additional expenditure that would be required Mr Dutt's scheme was—

(i) that the District Magistrate should in future be called the District Officer, and be employed purely on executive and revenue work, being relieved of his judicial duties, which should be made over to the District Judge,

(ii) that Assistant Magistrates should be employed purely on revenue, executive and police work, and be subordinate to the District Officer and that, when appointed to be Joint Magistrates, they should be employed purely on judicial work, and be subordinate to the District Judge,

(iii) that one half of the Deputy Magistrate should be employed on purely executive and revenue work, and be placed under the District Officer, and that the other half be employed on purely judicial work and placed under the district Judge,

(iv) that the District Judge should supervise the work of Joint Magistrates and Deputy Magistrates employed on purely judicial work,

(v) that the Sub-divisional Officers in Bengal should be placed under the District Judge, and the Sub-Deputy Collector be entrusted with the revenue work of the sub-division, and be subordinate to the District officer,

(vi) that he contemplated the need for an increase of 20 or 30 Sub-Deputy Collectors to assist the District officer at head-quarters, and suggested that these additional officers might be provided by withdrawing them from excise work

Apart from the cost which will, it contends, be involved in the adoption of Mr Dutt's scheme the Bengal Government urges—

(i) that the Subordinate Magistrates employed on judicial work will not be less actuated than now by a desire to satisfy the Executive Government, since their promotion must still remain with the Executive Government,

(ii) that great friction would arise between a locally-opposed judicial and executive authority,

(iii) that, as a result of the scheme, the District Officer, the sub-divisional judicial officer, and the sub-divisional executive officer, would lose the general experience which is of the utmost value to all officers

The District Officer and the sub-divisional executive officer would lose their position in the eyes of the public, and also the power of enforcing their orders and those of the Government, with the result that district and sub-divisional administration would soon be paralysed

(iv) that the District officer would only have the most junior and inexperienced officers to aid him in his executive duties, and that their subsequent employment as Joint Magistrates on purely judicial work would make them less fitted, owing to their training being one-sided and deficient, to become either District Officers or District Judges when their time came for promotion,

(v) that the subordinate executive service value the possession of judicial powers, and that so long as they are employed partly on executive and partly on judicial work, their time can be fully utilized In order to prevent work falling into arrears at times of pressure, the establishment of officers at each station would have to be permanently increased,

(vi) that the District Judge, being generally overworked as it is, would not be able to exercise his powers of supervision over the lower courts except himself purely as an appellate court, or by deputing the duties to the Joint Magistrate, in either case the supervision would be less effective than at present,

(vii) that the scheme strikes a blow at the sub-divisional system in Bengal, that a Sub-Deputy Collector would be quite unable to undertake the revenue, police and executive work of a sub-division, and that it would be therefore necessary to appoint an executive officer of at least the rank of a Deputy Collector to each sub-division,

The Bengal Government estimates that, to carry out Mr Dutt's scheme—

(1) 79 Deputy Collectors will be required for sub-divisions costing ₹3,79,200 a year, their ministerial establishments will cost ₹99,540 a year

(2) 30 Indian civilians must be added to provide a Joint Magistrate at each sadar station cost ₹2,88,000 a year with ₹37,800 for ministerial establishments

(3) At sadar stations 45 more Deputy Collectors at a cost of ₹2,72,700 (with ministerial establishments) will be required

(4) The District Judges must be increased by 12 to give one for each district cost ₹3,24,000 per annum, and ₹1,36,620 for ministerial establishments

(5) The initial cost of houses for sub-divisional officers would be ₹3,95,000, and many of the officers would have to be enlarged

The total cost of adopting Mr Dutt's scheme in Bengal is (1) recurring ₹15,37,860 (or if economy could be exercised to the extent of 25 per cent—I do not understand why the Bengal Government should take this figure—₹11,53,395), and (2) initial ₹3,95,000

Speaking of Mr Dutt's scheme the Madras Government observe that, as is well known to the Government of India, divisional charges in that Presidency are inconveniently large, Mr Dutt's scheme, by having the number of officers engaged in executive and judicial work respectively, will double the extent of each officer's local jurisdiction, and not only diminish the power of both executive and magisterial officers to do their work properly, but also cause gave inconvenience to the people by necessitating their travelling greatly increased distances in order to get their business transacted These objections would be fatal to the adoption of the scheme in the Madras Presidency, unless the district staff were doubled, and the money involved in adopting it would be better spent in increasing the number of divisions in charge of a single officer The Madras Government very pertinently notice that Mr. Dutt in his scheme has made no assignment of the powers for the prevention of crime and the preservation of the peace, provided in Chapters VIII—XII of the Criminal Procedure Code It is quite impossible, as the Madras Government observe, that these powers should be given to either the Judge or the police (Mr Justice Shepherd suggested that they might be given to munsifs !)

The entrusting the exercise of these powers to the District Officers would offend against the separation of functions, for which Mr Dutt and those who think with him contend Yet the facts given in paragraph 15 make it clear that the retention of these powers is absolutely necessary Mr Bolton, lately Chief Secretary to the Government of Bengal (paragraph 12 of his letter of 9th August 1900), has observed that "Mr Dutt's advocacy of the request for the withdrawal of the District Officer's judicial powers is strangely inconsistent with the fact that, when Magistrate-Collector of Backergunge, he found it necessary to make use of the preventive sections of the Code of Criminal Procedure for the preservation of the peace to an extent which was probably without precedent and has not since been exceeded Many hundreds of persons were required to give security to keep the peace, and, far from criticising his action, the very classes who have agitated for the separation of judicial from executive functions held up his administration of Backergunge as evidence of the vigour which may be found in a native District Officer"

Sir Antony MacDonnell has given his opinion that the adoption of Mr Dutt's scheme would necessitate a considerable strengthening of the staff, and, although he has not examined the question in detail, he has stated that at least one European officer would have to be added to each district, and that the additional expenditure required would be nearer ten than six lakhs of rupees a year

There can, it seems to me, be no question that the Madras, Bengal and United Provinces Governments are right, and that quite apart from the administrative objections to it Mr. Dutt's scheme could not, as the memorialists contend, be introduced without very considerable additional expenditure being incurred

A scheme for change propounded by Mr P M Mehta, and adopted by the Bombay Presidency Association, is referred to by the Bombay Government as representing the most extreme views in the Bombay Presidency There is not in the papers submitted by the Bombay Government a description of the scheme by the supporters of it, but Mr. Jenkins has given some details of it in the note forwarded with his letter of 13th June 1900 to the Government of Bombay This scheme recognises that the police must be under magisterial control, but is based on the objection entertained to the exercise of magisterial powers by officers responsible for the collection of the revenue Under the scheme there would be in each district a District Magistrate and a Collector the Subordinate Judges would be made first class Magistrates, and the second and third class Magistrates be provided by taking officers now on the Magistrate-Collectors' staff, who would not be required by the Collector The scheme would be expensive, it would be something like the the system discarded in Bengal in

1859, it would not in any way affect the control of the police by judicial officers, which the memorialists make the chief point of attack in the present system, and it would make the administration less vigorous and efficient than it is by limiting the number of European Magistrates in each district to one, *viz*, the District Magistrate It seems to me to be an absolutely impossible scheme

A suggestion thrown out by Sir Antony MacDonnell, but not pressed by him, is that should the independence of the criminal courts of the District Magistrate be insisted on, magisterial powers should be conferred on munsifs and Subordinate Judges The opinion of officers consulted by him was that this arrangement would provide very imperfectly for the discharge of magisterial duties The experiment, tried in the famine in the Bombay Presidency, of investing Subordinate Judges with criminal judicial powers was not regarded as a success either by the Bombay Government or by some of the High Court Judges (see opinions of Justices Candy and Fulton)

Mr Fox, District and Sessions Judge in the United Provinces, who considers that the balance of advantage lies in the complete severance of judicial from executive powers, admits that "if *complete* separation were effected, it would be necessary to have separate establishments, separate offices, and separate record-rooms The additional expense would be enormous, and no minister could venture to advise it" He accordingly proposes—

(*a*) that the District Magistrate should try no criminal cases whatever—original, revisional, or appellate,
(*b*) that all appeals and revisions should lie to the Sessions Judge,
(*c*) that a sufficient number of the district staff should be set apart for the disposal of criminal work, their deputation to the judicial line would not be permanent, but while so deputed, they would be entirely subordinate to the Sessions Judge,
(*d*) that Tahsildars, Cantonment and Honorary Magistrates should continue to dispose of cases within their jurisdiction as at present, but should be subordinate to the Sessions Judge in their magisterial capacity

He admits that this scheme would be a compromise only, and that it would cost something, and he, like Mr Dutt omits to refer to the question of who is to exercise the preventive powers now exercised by District Magistrates I think that I have said sufficient to show that his scheme is unsatisfactory.

Safeguards of the present system

17 The general objections stated against the existing system are not substantiated by the enumerated cases of abuse, and, admitting that in theory they may read very formidably, it must not be forgotten that there are in India certain safeguards against injustice that do not at present exist in England In the trial of cases in England Magistrates pay extraordinary regard to the evidence of the police, and sometimes, it must be admitted, their reliance on police evidence has been disastrous In India, on the other hand, the evidence of the police is regarded with suspicion in all courts from the highest to the lowest, and there is the greatest hesitation in acting on it without material corroboration The law, too, provides important safeguards which do not exist in England A full record has to be kept in all cases in which a warrant can issue for the appearance of the accused, except the small minority which are tried summarily by experienced Magistrates with special powers Even in an ordinary assault case, which results in a fine of Rs 5 or a sentence of a week's imprisonment, there must be a memorandum of the evidence Moreover, there is a right of appeal (the exercise of which involves little or no expenditure) against every conviction by a Magistrate of the second or third class and against every conviction by a first class Magistrate unless the sentence is a very light one Even when no appeal lies, there are extensive powers of revision by superior courts The extent to which the right of preferring an appeal or filing an application for revision is exercised in India would surprise a lawyer familiar only with the practice in England The accused has the right (section 191, Criminal Procedure Code) of having his case transferred from the Court of Magistrate, who takes cognizance of an offence on his own knowledge or suspicion, and the High Court has in addition large powers of transfer (section 526, Criminal Procedure Code) Every Judge or Magistrate is debarred, except with the permission of the Court to which an appeal lies from a decision or order passed by him, from trying or committing for trial any case to or in which he is a party, or personally interested (section 556, Criminal Procedure Code) Whenever abuse occurs a ready and inexpensive remedy is at hand Our courts of appeal have much greater powers of interference than they have in England They are much more easily approached, and they exercise their powers of interference with the greatest freedom That these safeguards are effectual is shown by the the fact that so few instances of injustice due to the present system can be brought forward

Original jurisdiction of District Magistrates

18. The necessity for retaining the preventive powers of Magistrates is established by what has been said above The next question that arises is whether it is necessary that District Magistrates should have the power of trying criminal cases. The cases tried by District Magistrates are of two kinds, *viz*, (i) those tried by District Magistrates in the regulation provinces in the exercise of the ordinary powers of Magistrates of the first class, and (ii) those tried by District Magistrates in non-regulation provinces in the exercise of special powers conferred under section 30 of the Criminal Procedure Code, the origin of which will be referred to later on

The following statement exhibits the amount of original criminal case-work undertaken by District Magistrates in the past two years:—

Provinces.		District Magistrates	Original criminal cases brought to trial	Number tried by District Magistrates.	Number of cases tried in exercise of powers under section 30 of Criminal Procedure Code	Percentage of cases tried by District Magistrates to original cases brought to trial	Percentage of cases tried less those tried under section 30, Criminal Procedure Code, to total number of original cases brought to trial
1		2	3	4	5	6	7
Madras	1899	22	232,760	76	. .	·03	...
	1900		227,935	49	...	02	
Bombay including Sind	1899	23	198,441	132	...	07	...
	1900		256,708	161	...	·03	.
Bengal	1899	45	152,371	1,685	55	1 1	1
	1900		155,657	1,816	61	1 1	1·1
United Provinces	1899	48	121,910	1,662	79	1 3	1·2
	1900		130,913	1,148	54	·9	·3
Punjab	1899	39	105,884	4,206	846	3 9	3 1
	1900		109,306	5,672	982	5 2	4 3
Burma	1899	36	75,168	1,821	Persons 995	2·4	.
	1900		71,490	1,635	„ 1,006	2 2	...
Central Provinces	1899	18	24,281	505	225	2	1 1
	1900		30,150	397	224	1 3	5
Assam	1899	8	15,144	424	39	2 8	2·5
	1900		14,604	615	45	4 2	3·9

It will be seen that the amount of original case-work varies considerably, the range being in 1900 from 49 cases (·02 per cent of the whole) in Madras to 5,672 cases (5·2 per cent. of the whole) in the Punjab The average number of original cases tried by a Deputy Commissioner in the Punjab was 145, and (as will be seen later) he had a large amount of criminal appeal work. I cannot help thinking that much of the time devoted to criminal case-work could have been better spent

The cases tried under section 30, Criminal Procedure Code, in 1900 were:—

Bengal	61
Oudh	54
Punjab	982
Burma	1,006*
Central Provinces	224
Assam	45

To my mind there are certain cases which must be tried by District Magistrates, *viz.*, the following. firstly, those affecting persons of different races or religions, secondly, those involving friction between civil and military interests, thirdly, those involving class or religious animosities in which persons of influence are interested on either side; fourthly, those in which there is a strong man, such as a talukdar on one side and a person without influence on another In none of these cases would the parties be satisfied with the decision of a Magistrate of inferior position, lastly, there are the cases under the law relating to the age of consent which have by law to be tried by the District Magistrate There would, I think, be no great harm in requiring District Magistrates by executive orders to limit their original work, as far as possible, to these cases

* Persons.

I also think that, except in Upper Burma and the Frontier Province, the powers now granted under section 30 of the Criminal Procedure Code might be withdrawn

Powers under section 30, Criminal Procedure Code

19 The origin of these powers is as follows Section 22 of the Criminal Procedure Code of 1861 (Act XXV of 1861) gave the Magistrate of the district or other officer authorized to exercise the powers of a Magistrate the power to give a sentence of imprisonment not exceeding two years This Act (*vide* section 445) came into operation in the Presidencies of Bengal, Madras and Bombay on January 1st, 1862, but not in any part of the territories of British India not subject to the General Regulations of Bengal, Madras, or Bombay until extended thereto by the Governor General in Council or the local Government

In the Punjab, Oudh and Burma the Deputy Commissioners of Districts had been empowered by executive order to award longer terms of imprisonment In his report of the 29th December 1858 the Judicial Commissioner of the Punjab (paragraph 70) recommended that, in order to relieve Commissioners (then also Sessions Judges), the Deputy Commissioners or other officers actually in charge of districts should be empowered to decide certain cases, *viz*, manslaughter, affray attended with homicide or severe wounding, rape, unnatural crime, adultery, forgery, counterfeiting coin, abortion, and perjury (which had, except adultery, been previously cognisable by the Court of Sessions only), whenever they considered the penalties which they could inflict to be sufficient for the particular offence, committing to the Sessions only the graver cases, and that, to this end, they should be invested with powers of imprisonment, for these descriptions of crime, up to three years, exclusive of the additional one-fourth in commutation of unrealized fine, and of corporal punishment This proposal was sanctioned Its effect in the year after it was introduced was stated to have been to reduce the sessions cases from 712 to 408, and it was remarked "the Commissioners have thus been relieved of some considerable amount of labour, without any enhancement of the work of the District Officer"

In Oudh the local Government was given powers to invest Deputy Commissioners with the powers of a Court of Sessions in all cases, not demanding a sentence of more than seven year's imprisonment

Owing to the prevalence of dakaiti in Burma sanction was given in the Foreign Department letter of June 10, 1853, to the proposal that Deputy Commissioners should be allowed to award sentences of seven years' imprisonment in the case of convictions for dakaiti

When the question of extending the Code of 1861 to non-regulation provinces was referred by the Foreign Department to the heads of those provinces, the authorities in the Punjab, Oudh and Burma advised that it would need modification so as to provide for the exercise of enhanced powers by Deputy Commissioners

This was provided for by Act XV of 1862, which gave power to the Governor General in Council or the local Government, on the extension of the Code of 1861 to a non-regulation province, to invest the "chief officer charged with the executive administration of a district in criminal matters, by whatever designation such officer is called," with power to try all offences not punishable with death, and to pass sentences of imprisonment up to seven years This section was continued in section 445-A of Act VIII of 1869, by which, among other things, Act XV of 1862 was repealed, and by section 445-B, such officer was required to try as a Court of Session offences triable under the schedule by a Court of Session only The power to try such cases as Courts of Session was not continued to the heads of districts By the Criminal Procedure Code of 1872 (section 36) any sentence of more than three years passed in the exercise of these special powers was made subject to the confirmation of the Sessions Judge

By the Code of 1898 any Magistrate of the first class was made eligible for these enhanced powers, the courts existing these powers were empowered to pass any sentence authorised by law, except a sentence of death or of transporation for a term exceeding seven years, or imprisonment for a term exceeding seven years, and the provision requiring the confirmation of the Sessions Judge in the case of sentence of imprisonment for a term exceeding three years was repealed

The Central Provinces have considerably less crime than some of the regulation provinces Some of the districts of Oudh adjoin much more criminal districts of the Province of Agra, and the districts of the latter province adjoining the Punjab are at least as criminal as the contiguous districts of the latter Province It seems to me that, generally speaking, economy is now the ground for the retention of the powers which can be granted under section 30 of the Criminal Procedure Code It may, indeed, be said that it is a culpable waste of time and money to resort to the pomp and ceremony of a trial by assessors or a jury, where, but for a previous conviction, a charge of theft or other offence against property would have been tried summarily, but, on the other hand, it appears to me to be the case that these trials of persons committed to Sessions solely because they have been previously convicted do not as a rule take long, and that is a far more culpable proceeding to divert the District Magistrate from his other multifarious duties to the trial of such cases I understand from conversations with them, that Sir Charles Rivaz and Mr Fraser are favourably disposed to the withdrawal of these powers in the Punjab and Central Provinces subject, of course, to an increase in the number of Sessions Judges Proposals for the withdrawal of the powers in Assam have been

made to the Home Department and will probably be accepted Some expense would be involved in the change, but it would, I think, be legitimate expense, and it would help to relieve Districts officers of criminal case-work, which it is not absolutely necessary that they should perform

Appellate and revisional powers of District Magistrates

20 The next question is whether it is necessary to retain the appellate and revisional powers of District Magistrates

The Hon'ble Mr Raleigh suggested (note of 13th March 1900) that criminal appeals might be transferred from the District Magistrate to the District Judge, and that this change would be an additional security for justice The transfer of appeals to the Sessions Judge would, of course, also involve the transfer of the powers of revision and of the duty of supervising the courts for the hearing of whose appeals the Judge would become responsible The Criminal Procedure Code gives a local Government authority to empower Magistrates other than the District Magistrate to hear appeals from second and third-class Magistrates, but it would appear that it is only in the Madras Presidency that this work is mainly undertaken by Subordinate Magistrates and not by the District Magistrate himself In Madras, in 1899, the District Magistrates heard only 299 appeals, while the Sub-divisional Magistrates heard 7,961. The figures are not given separately for 1900 The number of appeals disposed of in 1900 by District Magistrates (helped apparently to some extent by Subordinate Magistrates empowered to hear appeals) was 4,141 in Bombay, 5,018 in Bengal, and 3,979 in the Upper Provinces In the Punjab District Magistrates themselves heard 6,588 appeals, in Lower Burma 1,225, in Upper Burma 311, in the Central Provinces 1,133, and in Assam 392

In addition to the hearing of appeals District Magistrates do a lot of revisional work, and it seems to be not unfair to infer from the fact that applicants for revision under section 435 of the Criminal Procedure Code appear to be as ready to make their applications for revision to the District Magistrate, that litigants do not themselves think that the union of executive and judicial functions in the District Magistrate tends to make him other than impartial The powers of the Sessions Judge and the District Magistrate under section 438 of the Criminal Procedure Code are co-ordinate An application for revision lies to the Sessions Judge in every case in which it lies to the District Magistrate All cases decided by the District Magistrate himself in the execution of his original powers are liable to come before the Sessions Judges in revision. In the Madras Presidency, where there is only one district which has not its own District and Sessions Judge as well as its District Magistrate, there were in 1900, 734 applications for revision on behalf of 2,383 persons made to the District Magistrates as compared with 483 applications on behalf of 1,574 persons made to the Sessions Judges In Bombay, where the District Magistrates exceed the Sessions Judges by six 1,159 applied for revision to the District Magistrates as compared with 1,231 who applied to the Sessions Judges In the United Provinces, where there are 28 Sessions Judges as compared with 48 District officers, 1,717 applications for revision were made to the District Magistrates by 558 persons as compared with 2,019 made to the Sessions Judges. In the Punjab 3,085 persons applied for revision to the 31 District Magistrates as compared with 1,861 who applied to the 14 Sessions Judges In Burma, where the District Magistrates number about four to each Sessions Judge, applications for revision were made to the District Magistrates by 14,612 persons as compared with 3,525 to the Sessions Judges In the Central Provinces, where there are 18 District Magistrates and 4 Sessions Judges, 441 persons applied for revision to the former and 111 to the latter

There are 249 districts in the provinces of British India, and 134 Sessions Judges It must, I think, be admitted that, if the power of hearing an appeal from or an application for revision of orders of a second or third class Magistrate is to be taken away from the District Magistrate, a Sessions Judge will be required in each district for two reasons firstly, because otherwise the work could not be done and, secondly, because it is not fair to require appellants in trumpery cases to have to go long distances in order to exercise their right of appeal This change then would involve a very serious increase of expenditure

The question of transferring the power of hearing appeals (not including applications for revision) from the District Magistrate is evidently of no great importance in the Madras Presidency since the Madras Government observe "it is only in rare instances, as in the absence of a qualified divisional officer or where the original judgment is passed by a covenanted Assistant Magistrate without a division, that the District Magistrate himself undertakes the hearing of appeals from the judgements of his subordinates" The retention of the power there can have no practical influence on the position of the District Magistrate, or on the supervision by the District Magistrate of the Subordinate Courts Though the District Magistrates try very few original cases and hear very few appeals, they have 50 per cent more applications for revision than the Sessions Judges The Bombay Government have not dealt in detail with the question of the transfer of appeals The Lieutenant-Governor of Bengal has come to the conclusion that no necessity has been established for relieving the District Magistrates of their present criminal appellate work, and is clearly of opinion that the District Judge would never carry out the duty of inspecting the work of the Subordinate Magistrates in a district in the same way as the Magistrate of the district The opinion of Sir Antony MacDonnell is (i) that the change of jurisdiction could not be effected without an increase in the number of Judges, that it could not be carried out without depriving the Magistrate of a valuable source of information regarding the character and abilities of his subordinates, and (iii) that the crying need in the United Provinces is for more supervision and control over

subordinate judicial courts and that, instead of adding to the work of the District and Sessions Judges, it would be preferable to add to their number, and so enable them to control more effectively the courts at present under them

The Punjab Government has suggested that the hearing of appeals from the decisions of third-class Magistrates should be transferred from the District Magistrate to the District Judge (this official does not correspond to the District and Sessions Judge of other provinces and to properly qualified Assistant Commissioners and Extra Assistant Commissioners) The local Government has power to carry out this change by notification under the Criminal Procedure Code It would not in any way mean a separation of executive and judicial functions since the District Judges, Assistant Commissioners and Extra Assistant Commissioners are all subordinate to the District Magistrate The District Magistrates in the Punjab are evidently overweighted with appeals at present, and, quite apart from the question of the separation of executive and judicial functions, require some relief

In my opinion no duty which a District Magistrate has to undertake is more tiresome and unsatisfactory—except the assessment of the income-tax—than wading through the papers in a petty criminal appeal from a third class Magistrate in a trumpery assault case, and I feel sure that District Magistrates would themselves welcome relief from the work But it furnishes them with opportunities for gauging the capacity and honesty of their subordinates, and it is impossible to doubt that the subordinates themselves benefit more than they would by the more formal and distant control of the Sessions Judge Judging from my own experience a Judge does nothing to help a Subordinate Magistrate I was employed at one time for six years continuously on magisterial work, with my decisions appealable to the Judge, who was living during the greater part of the time in the same station He never inspected my Court or gave me a single hint, even in conversation, outside what was said in orders on appeal or revision in particular cases I can conscientiously say that I learnt nothing about my magisterial work from the Sessions Judge, but a great deal from the District Magistrate If this is true of a European Magistrate, living at the same station with a Judge, how much more true is it likely to be of a Tahsildar, resident in an outlying tahsil, who will probably not even know the appearance of the Judge? The change cannot be effected without a considerable amount of expense, and everything tends to show that it will be accompanied by a deterioration in the quality of the work of subordinate Courts, while it will not afford any additional security for justice for these reasons it should be discarded It may, however, be explained by circular order that the District Magistrates' control over subordinate Courts should be limited in the manner suggested in the third head of suggestions in the Hon'ble Mr Raleigh's note of 13th March 1900

Question of taking away the executive powers of Magistrates subordinate to the District Magistrate

21 Some of the authorities consulted mainly in Bombay and the United Provinces have expressed themselves in favour of leaving the powers of the District Magistrate as they are for the present at any rate, but effecting a separation of the executive and judicial functions among some of the Subordinate Magistrates The Subordinate Magistrates have under the law no authority over the police, except what is given by the Criminal Procedure Code, but in some provinces the Sub-divisional officers receive police reports and inspect police stations and such-like duties, and in some provinces Tahsildars, though they are given no authority over the police, inspect police-stations, while it is everywhere their duty to keep the District Magistrate informed of what is going on in order that he may properly exercise his power of control over the police Sub-divisional officers and Tahsildars are also employed in revenue and other fiscal matters, as Municipal and Local fund officers, and in numerous miscellaneous executive duties The amount of criminal judicial work done by Sub-divisional officers is large in every province, the amount done by Tahsildars and corresponding officers is very small in Madras, comparatively small in Bengal, and considerable in other provinces The character of the cases tried by Tahsildars and officers of corresponding rank is for the most part unimportant and consist mainly of petty thefts, assaults, and prosecutions for offences under section 34 of the Police Act and under local laws Three Judges of the Bombay High Court (Sir Lawrence Jenkins, the late Mr Ranade, and Mr Fulton) have expressed an opinion in favour of relieving Subordinate Magistrates of executive duties The late Mr Ranade considered that, while the District Magistrates in the Bombay Presidency had seldom been found fault with for exercising their judicial power in subordination to their executive functions, the Subordinate Magistrates, both European and Native, had often done so He wrote "As the abuse of power on the part of the District Magistrate has been found by experience to be so rare, and the temptations to abuse, as also actual abuse, are more operative in the case of subordinate officers, I would for the present confine the question of reform to this last class of officers" Mr Justice Fulton was in favour of relieving Assistant Collectors and Deputy Collectors and possibly Mamlatdars from the necessity of trying cases, and held that the object should be to have a stationary court in each taluka He proposed, however, that the Collector and his assistants should remain District and Sub-divisional Magistrates for the purposes of superintendence and appeal Mr Whitworth, Judicial Commissioner in Sind, proposed that the duties should be separated in the case of all native Magistrates exercising executive functions, but not in the case of English Magistrates Mr Justice Candy took an opposite view He expressed himself in favour of trying the experiment of relieving the Collector of magisterial powers in selected districts, but is opposed to any sharply defined line being drawn between the subordinate judiciary and the executive officers, so that an officer entrusted solely or mainly with the trial or magisterial

cases should always be confined to that work He expressed himself strongly against arm-chair Magistrates and added, "In my humble opinion the best judicial officer in this country is he who has had some opportunities of travelling about and being in real touch with the people"

The feeling in Bombay, among those who oppose the present system, is that fiscal officers, and particularly Mamlutdars, should not try offences against the forest, salt, opium, abkari laws, etc The Bombay Government contend that the bias Magistrates in trying such cases is against the Government, and that they are never unduly severe, but often too lenient Among the opinions received from the United Provinces there are a certain number (among them those of three or four district officers) in favour of relieving the officers corresponding to Mamladars, *viz*, Tahsildars of judicial functions for one or two reasons, *viz* (i) that they are unfit by training to exercise judicial powers, and (ii) that they are apt to display bias in their criminal case-work, and to use their criminal powers for revengeful purposes Some have expressed the opinion that magisterial powers are necessary to enable Tahsildars to carry out their executive duties, others that they are not Unless he has shown some capacity as a Magistrate a Tahsildar is left with 3rd class powers, and every order he passed is appealable It must be admitted that he is not, as a rule, possessed of much legal knowledge, and that some Tahsildars do occassionally allow themselves to be influenced improperly in the decision of criminal cases I have myself more than once found a Tahsildar importing some private bias into a criminal case, and cases, such as that cited by Mr Giles from Sind, in which a native Magistrate (exercising executive powers) concocted a fase case against his Brahman peon, who was also his cook, and tried and sentenced him with undue haste, do occasionally occur But instances of Munsifs and even Subordinate Judges trying to get the Tahsildar to run in enemies of theirs are also not unknown, and in the present state of civilization in India, what the native describes as *zid* is liable at times to influence any Native Magistrate, whether exercising only judicial powers or executive powers as well The great difficulty would be to replace Tahsildars and Mamlatdars by a more efficient class of Native Magistrates The change would be expensive as, unless the people are to be inconvenienced beyond what is now the case, there must be a stationary Magistrate in each tahsil or taluk, and the presence in each tahsil of two authorities, one executive and one judicial, could hardly fail to result in friction. The experiment has been tried in the Madras Presidency, and the experience gained there of the results of substituting stationary Sub-Magistrates for Tahsildars is worth more than any theoretical opinions on the subject can be For ten years there have been stationary Sub-Magistrates in the great majority of the taluks in the Madras Presidency the duties of the Tahsildars have been almost solely executive, while those of the stationary Sub-Magistrates are entirely judicial The Madras Government observe —"While the general standard of efficiency of the subordinate judicial tribunals has doubtless been improved by the establishment of a separate class of Magistrates whose time is wholly devoted to judicial work, the change of system has probably exercised a prejudicial effect on the detection of crime, and has certainly diminished the safeguards which formerly contributed to the general maintenance of order" It is found that the stationary Sub-Magistrates cannot properly preserve order and maintain authority, while the influence of the Tahsildar has been so much diminished that he has become a mere head revenue inspector instead of the responsible head of the taluk Mr Justice Benson, who tried the appeals of those convicted for causing disorder in the Tinnevelly District, noticed the evil results of the system in making the superior Magistrates dependent for their information upon stationary Magistrates divorced from all concern with the general administration

I agree

DENZIL I[BBETSON]

I venture to think that, with this experience, it would be very unwise to substitute stationary Magistrates without executive powers for Tahsildars and corresponding officials Constant and close supervision over their work is required, but, if properly supervised by the District Magistrates, they will, I venture to think make more efficient criminal courts than stationary Magistrates with no other duties, except those of hearing cases

There is, in my opinion, even less ground for making Joint and Assistant Magistrates and Deputy Magistrates purely judicial officers than there is for taking judicial powers from Tahsildars They, except those in their first year of service, are first or second class Magistrates, appeals against whose orders go to the Sessions Judge and not to the District Magistrate, and I think that it is generally the case, as Sir Antony MacDonnell observes, that they resent anything that looks like undue interference with their independence in cases before them This view is borne out by cases such as those cited in Mr Feraid's letter of 17th July 1900

There is one matter in which all Subordinate Magistrates, in my opinion, require protection, at all events, in some provinces It is a common practice in some provinces, but I cannot say whether it exists in all, for the head of a fiscal department, such as the Forest or Excise Department, when dissatisfied with a Magistrate's decision or the amount of punishment given by him in a fiscal case, to ask his official superior that he may be called on to explain the reasons for his order A call of this nature generally conveys the impression that the authorities from whom it comes regard the decision as open to exception, and it eventually comes to the Magistrate from his Collector who is also his superior Magistrate I venture to urge that no Court should be required to give explanations as to a case decided by it except by the Court before whom its decision has come on revision or appeal This evil is to my mind a very serious one in some provinces at all events, and I think that general instructions to prevent it are desirable and would do good

22 Upon the memorial as it affects the revenue administration Mr Fuller has written: "The contention that the Civil Courts should have power to review revenue assessments is quite impracticable In the first place, they have not the special knowledge which is necessary for the understanding of the difficult subject of land revenue settlement, and could not deal with it satisfactorily In the second place, the liability to Civil Courts' control in matters of taxation would develop in this country an immense amount of speculative litigation, and might lead to the temporary disablement of the Executive Government by a foolish or perverse decision Thirdly, taxation as a prerogative of the State, exercised for State purposes, cannot logically be controlled by courts of law To invest Indian Courts with powers of controlling it would give them higher authority than is enjoyed by the Courts in England, where the Commissioners of Revenue are the sole arbiters on questions of Imperial taxation The arguments against permitting a Civil Court appeal from the order of a settlement officer fixing a rent are not quite so strong, but are strong enough The main objection to Civil Court jurisdiction lies in the necessary lack of the special practical and local knowledge on which the determination of a fair rent must rest, the appreciation of which has led to a tendency to restrict rent cases more and more to the jurisdiction of Revenue as opposed to Civil Courts An apt illustration in point is afforded by the recent amendments of the Central Provinces Tenancy Law which has greatly increased the powers of revenue officers to interfere with rents, by provisions which were accepted, absolutely without question, by the people, on the strength of their experience of settlement procedure during the immediately preceding years Similar arguments apply in regard to the tenancy jurisdiction of Revenue Courts during the currency of settlement In these proceedings Government has of course no fiscal interest and their committal to the Revenue Courts is simply due to a conviction that Revenue Courts can best deal with them The law admits the authority of the Civil Courts in cases which raise difficult questions of title, and nothing more seems to be required In regard to the apportionment of profits between superior and inferior proprietors, and the framing of the record of rights, the authority of the revenue administration rests on the fact of its special capacities and the opportunity of gaining information which is afforded by its power to inquire into matters locally and generally, free of the formal limitations which Civil Court procedure imposes The control of the staff of village officers is clearly a function of Executive Government There remains the matter of partition This must be effected by proceedings undertaken *on the land*, which a court of law cannot effectively control and, moreover, it involves the interests of Government in respect to the security for its land revenue The one direction in which a change of procedure might be sustainable is in giving Civil Courts power to interfere in cases of *improper collection* of taxes They have this authority in Madras, Bombay and in the non-scheduled area of Bengal But its possession does not appear (in Bombay at all events) to have rendered the operations of the tax-gatherers less disliked than they are in provinces where redress can only be obtained from the revenue authorities, and it is impossible to find in experience any justification for the assertion that remedy is easier or more certain or that the people are more contented, under one system than under the other"

Question of removing revenue court powers from District Magistrates

See Alexander Anderson's opinion in the Punjab papers

Denzil I[bbetson]

So they have in the Punjab, the United Provinces and Upper Burma (and I imagine, in other provinces also) under the Land Revenue Act

Denzil I[bbetson]

There is, if I may venture to refer to a matter connected with revenue administration, one point in which, in my opinion, the combination of revenue, executive and judicial powers is open to criticism, *viz*, as regards the classification of State land in Upper Burma The duty of classifying land into State and non-State land is imposed in the Deputy Commissioner by section 24 of the Land and Revenue Regulation of 1889 The Deputy Commissioner, who has classified any particular piece of land as State land, is the officer who adjudicates on its status in the event of his classification being disputed The Civil Court is expressly excluded from jurisdiction Mr Todd-Naylor (Officiating Commissioner of Meiktila) has observed that this places the Collector in a difficult position, and Mr Adamson, Commissioner of Mandalay, has expressed a strong opinion against this union of functions, and has stated that it would be easy to point out grave scandals that have occurred under this procedure The Lieutenant-Governor admits that the law is open to criticism, and would not advocate its retention as a permanent part of the revenue system He describes it as a transitory provision forced on the Government by the circumstances of Upper Burma The settlements being carried out in Upper Burma are, it is said, leading to the final determination of these questions, and it is anticipated that, when the whole of Upper Burma has been settled, the necessity for the special procedure will probably cease to exist I have not the knowledge to say whether this is the case, but the present arrangement seems to me to be objectionable

23 It has been already stated that in the regulation provinces, except in very small remote and uncivilised tracts, the disposal of civil suits has been made over to the Civil Courts As the statement made in paragraph 8 shows, the policy of the Government of India has been to follow the same principle in non-regulation provinces as circumstances admit The transfer of all such cases has been completed in Oudh, it has been partially effected in the Punjab and also in the Central Provinces In one particular the reform has been completed in these two provinces The Commissioner, formerly the District and Sessions Judge, has been completely relieved of criminal and civil court work.

Removal of Civil Court powers from District Magistrates

Assam and Burma are still behindhand, but the Chief Commissioner of Assam has recently proposed the withdrawal of all judicial powers (Criminal and Civil) from the Commissioner of the Assam Valley Districts, and the appointment of a second Judge in addition to the Judge at Sylhet The Government of Burma has also submitted proposals for the constitution of separate superior and subordinate judicial services in Lower Burma I submit that the time has come when regular Civil Court establishments ought to be appointed throughout these four provinces The most recent figures showed that the receipts from the administration of civil justice have been increasing rapidly and now give a profit over India as a whole The demand for a reduction of the court-fees may be expected to grow Before any consideration can be given to such a plea, it will be necessary, not only to improve the court-houses and strengthen the ministerial establishments in some of the provinces where there are already separate Civil Courts, but also to give separate Civil Courts to provinces which have got them only partially or not at all The time for this seems to me to have arrived in the Punjab, the Central Provinces and Lower Burma

And the Central Provinces has done the same now, I think

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24 Mr Dutt, speaking of Bengal alone, himself admitted that a change of system could not be effected in Chota Nagpur, Darjeeling, the Chittagong Hill Tracts, and the Sonthal Parganas He thus omitted all the non-regulation parts of the Bengal Province The inference is that all other non-regulation provinces, and many portions of regulation provinces not so advanced as Bengal would have to be exempted from the change This is admitted by Mr Cotton He without any knowledge of any of the advanced provinces of India, except Bengal, observes "It is imperatively called for in the advanced provinces of India It would be desirable to introduce the separation gradually, and, in the first instance, into the most advanced portions of these provinces only In many parts of India it would be an act of folly to introduce any change, and in such places, whatever abuses may be inherent in the present system, there can be no doubt that the balance of advantage would be altogether in favour of leaving the existing arrangement undisturbed" In any case then, even if the memorialists had their way, there would be a considerable part of India managed in one way, and a considerable part in another In my opinion, however, no part of the country is fit for the change Mr Monro has been Commissioner of the Presidency Division, a Judge of one district of it, has exercised jurisdiction throughout it as Inspector-General of Police, and has lived in it for years as a missionary It claims to be the most advanced part of India and probably it is in some matters Yet with all its educational advantages it accounts for one-sixth of the criminal cases in Bengal, and 15 per cent of the cases affecting the public tranquillity are returned from it It would be a most unsuitable place in which to weaken the executive in criminal matters If, however, an experiment can not be tried in it, the inference is that it should not be tried anywhere

Question of trying a change experimentally in a particular area

25 The conclusions, than at which I venture to think that the Government of India should come are—

(i) that any change in the position of the District officer as the controller of the police would be most detrimental to the people, as the removal of his power and authority would certainly tend to abuse on the part of the police,

(ii) that the District officer, without magisterial power, would be led to regard all police matters from a purely, police point of view with great detriment to the public interests,

(iii) that the preventive powers of the District Magistrate must be retained in his hands as they are at present,

(iv) that the District Magistrate should retain his powers of hearing original cases but that they should be sparingly exercised and generally limited to cases such as are referred to in paragraph 18,

(v) that powers under section 30 of the Criminal Procedure Code should be taken away from all Deputy Commissioners except in the Frontier Province and Upper Burma

(vi) that the District Magistrate should retain the Powers of appeal, revision and Superintendence of subordinate courts which he now has,

(vii) that Magistrates subordinate to the District Magistrate should not be deprived of their executive powers,

(viii) that section 191 of the Criminal Procedure Code might be enlarged, as proposed by Mr Justice Chatterjee, so as to provide that a Magistrate shall be required to give the accused the opportunity of being tried by another court in cases in which he (the Magistrate) has given directions to the police in the course of inquiry as is already provided in cases in while a Magistrate proceeds upon information received from any person other than a police-officer, or upon his own knowledge or suspicion that an offence has been committed,

(ix) that, where the Commissioner of a Division is still Sessions Judge, as in Assam and Lower Burma, steps should be at once taken to appoint a separate Sessions Judge to undertake the duty The sparseness of the population in Upper Burma is against the change being made there at present,

Since done in Assam, I think

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(x) that civil judicial work should be taken away from the executive authorities by creating more Civil Courts in the Punjab and the Central Provinces and by establishing separate Civil Courts (as is now proposed) in Lower Burma, and also in Assam

J P HEWETT,—15-4-02

I —*Preliminary*

I am afraid it is too much to hope for that all Hon'ble Members should read for themselves the whole of the opinions which we have received from local Governments Mr Hewett has written an admirable note, with which I am in general agreement But he has wholly failed to bring out—indeed, it would be almost impossible to do so within the limits of a note—the overwhelming weight of argument, opinion and authority against the assertions and proposals of the memorialists which these papers reveal I confess that it has astonished me Almost every page tempts me to quote almost every point taken tempts me to illustrate and enforce it from my personal experience—temptations which I have done my best to resist

2 The union of executive and judicial functions in the same individual is attacked on two separate grounds,—first, that it is objectionable in principle and secondly, that it produces evil results in practice The objections of principle are very much taken for granted, and indeed it must be admitted that the combination is opposed to the principle which underlies the English judical system though it is clear from paragraph 9 of Mr Hewett's note, and also from some confidential notes upon the relations between the police and the Magistrates at home which Sir A Fraser obtained through Sir Charles Crosthwaite, and which I put up below, that separation, at any rate in England and Ireland, is by no means complete, and that it dates for the most part from very recent times

3 In my opinion the independence of the judiciary has become a fetich in England, and it has become so from political and historical reasons, since in that independence the English people have found their main bulwark of defence against the tyranny of the Crown It is, I believe, very generally recognised that the virtual freedom of the English magistracy from executive control is attended by many and serious practical disadvantages But these disadvantages are a part of the price which a free people are content to pay for the privilege of governing themselves

4 The people of India do not govern themselves Our deliberate and established policy is to allow them as large a measure of freedom as is compatible with the best possible administration of the Government But there is no reason whatever why, in their case, we should accept the practical disadvantages which attend the absolute exemption of the judicial agency from all external guidance and control, merely in order to comply with an abstract principle which, under conditions and for reasons which do not exist in India, has assumed an importance in England which under other circumstances would be exaggerated There is not the slightest danger that, under British rule controlled by the House of Commons, the freedom of the people of India will ever be unduly contracted, or the independence of the judicial bench unduly encroached upon The danger is rather that, under uniformed pressure from home, they may be unwisely enlarged, and it is one of our most important and most difficult duties to resist such pressure

5 I attach the greatest possible importance to the absolute independence of a Judge in the decision of the individual case which is before him I believe that one of the most valuable political lessons which we have taught the people of this country, and the one which has startled and impressed them most, as being most foreign to their past experience, is our readiness to subordinate the Executive Government to the Law It has, in my opinion, done more than any other single factor to impress them with confidence in our even-handed justice, and in the uprightness of our rule That independence I would jealously guard against encroachment, and in so far as our system has failed or tends to fail in so guarding it, it is open to objection

6 But it is one thing to say that the Executive shall not dictate to a Judge in his dealings with an individual accused, and it is quite another things to say that the Executive may not issue general directions for the guidance of inexperienced Magistrates in the exercise of the discretion which the law allows them, or many not criticise their conduct of past cases with a view to improvement in the future The Judicial and the Executive are two branches of one Administration, and their common object is to govern the country and its people in the manner which will most conduce to their happiness and prosperity We cannot have two Governments in the country, the Executive Government must be supreme, that Government is best able to judge of the working of the duplex machinery, and of the needs of the Administration, and it is its bounden duty to guide and control the administration of justice so far as may be necessary to secure that object It is well, in order to avoid all appearance of conflict between the two branches, that the necessary guidance should be given and control exercised as far as possible by an officer acting in a magisterial capacity, and that is rendered possible by the existing system and would be impossible under any other But it would be an abnegation of an important portion of its duty if the Executive Government abandoned its control over and responsibility for the efficient administration of criminal justice

Some instance that occur to me of the sort of cases in which directions are required are, the commitment to the Sessions of habitual criminals and train-wreckers, adequate sentences upon cattle-thieves and rick-burners, where those offences are common, light sentences for first offences, sending boys to reformatories instead of to prison, whipping, instead of imprisonment, in certain cases, nominal sentences for pilfering in time of famine, but deterrent ones for organised looting of grain

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7. At the same time, separation is undoubtedly in consonance with English traditions, and we may accept it with Lord Dufferin, as a "counsel of perfection" The practical question remains as put by Lord Hobhouse "How far the separation shall be carried, so as to secure the utmost amount of independence in the judiciary that is consistent with the

unity and stability of Government, is a question of statesmanship depending on the condition of the country" In answering it there are certain points connected with "the condition of the country" which it is very important to remember

8 We are a handful of Englishmen ruling millions, often (as in Southern India) with very scanty military support, to which, in any case, it is highly inadvisable to have recourse save in the last resort

9 The millions whom we rule are a medley of races, creeds and sects, with discordant views and conflicting interests Though generally peacable and orderly, they are ignorant, credulous and superstitious in the highest degree, easily inflamed by an appeal to their religious or racial prejudices, and apt to break out at any moment Mr Hewett gives recent instances in paragraph 15 of his note Whole classes of the population are criminals by hereditary profession, and in most of the towns and cities there is a strong leaven of turbulence

10 As Englishmen ruling over natives, we enjoy the advantage of a detachment which is probably without parallel elsewhere among civilised Governments To an English Magistrate it is a matter of indifference whether the parties with whom he is dealing are Hindus or Muhammadans, Brahmins or sweepers, great zamindars or small cultivators The personal element, which is always a danger in the administration of justice, is at its minimum, and it is therefore safe to trust us with powers which it might be unwise to confer if that element were more prominent

11 A strong and efficient administration of criminal justice is not only one of our first duties to the people, but also one of the first essentials to our rule In India, crime unchecked commonly leads to turbulence and disorder, and it is not so very long ago that whole tracts were virtually laid waste by organized dacoity. Any slackening of the reins is fatal Our railways, telegraphs, and postal arrangements offer increased facilities to the professional criminal, and incessant watchfulness and ever-increasing efficiency are needed if we are to discharge the first duty of government (after the protection of our external frontiers), which is to preserve the peace, and to maintain the security of life and property

The Police Commission, in paragraph 12 of their report, give an interesting picture of the manner in which crime became rampant when, on taking over the older provinces, we first substituted the modern system of dealing with criminals for the rude methods of the native governments

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12 The rule to which the masses are accustomed, and the rule which they best understand, most appreciate, and most readily obey, is the personal rule of a strong and upright ruler—the *hakim* who gives the *hukm* or order, and who has the power to enforce it

13 The people entertain a strong objection to all Government interference *as such*, which is the result of long experience of Oriental rule It is not (save where their religious or domestic life is concerned) based, as in England, upon jealousy of interference with individual liberty, but rather upon the conviction that interference by native subordinates, backed by the power of Government, involves extortion, if not more serious trouble

14 As regards criminal inquiries by the police, this attitude is wholly reasonable We work through an uneducated, ill paid and corrupt agency it is necessary to give them power, notwithstanding the certainty that they will abuse it, and the advent of the police in a village is often a greater terror to honest folk than it is to evil-doers

See paragraph 25 of the Police Commission's report for a description of the conduct of a police inquiry

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15 Nor is the case much better when the criminal courts are concerned It is bad enough to have to travel any distance up to 40 miles (and sometimes much more) to give evidence, often several times over That, however, is unavoidable if justice is to be done But the evil does not end there One of the scandals of our administration is the absolute contempt for the convenience of parties and witnesses which is very generally displayed by native Magistrates unless subjected to strict control Adjournment after adjournment is the rule rather than the exception in many courts—sometimes the unavoidable result of pressure of work, but more often justified by the most frivolous pretexts, or given without reason at the request of the counsel employed, whose fees are thus enhanced

16 The consequence is that it is a dire misfortune to be involved in any capacity in criminal proceedings, so that we have the countryside against us, instead of with us, in our efforts to detect and punish crime, and that, apart from the individuals directly injured, the general attitude of the respectable classes is one of abstention, if not of opposition

17 This very attitude makes the concoction of false cases against an enemy easy In England a decent man will hasten to testify to the innocence of one wrongfully suspected of or charged with crime In India it is no more the business of an honest man to disprove a false than to prove a true case; and a false criminal charge is the traditional method of scoring off an enemy, or getting rid of an inconvenient rival

18 A most serious difficulty arises from the peculiarites of the Indian code of ethics They have their code, and stick to it, but it is not the same as our own A decent man will not testify in support of a false charge, unless it is against an enemy by whom he has been injured so deeply as to be absolved from all restrictions, or against so intolerable an evil-doer that the village must be rid of him at any price But in support of what he knows or believes to be a true charge, he will conscientiously swear to any number of circumstantial lies, if by so doing he thinks he can persuade the court to the right conclusion

19 The result is, that there is hardly a single case that comes into Court, however true, that is not supported by evidence which is partly false The object of the witnesses is, not to state the truth, but to obtain a verdict, and the evidence is always strengthened and improved before being presented to the Court What the Indian Magistrate has to do is to sift the false from the true, to estimate the probabilities in each case, to be on his guard against false charges, to distrust evidence which is too consistent, to decide which portion to believe of evidence which is inconsistent With long experience of natives and their ways, he acquires a sort of instinct, which no doubt often fails, but which, on the whole, serves him well in arriving at the truth and doing substantial justice And the wider his experience, the truer is the instinct upon which he has to depend

The Police Commission write—"If in the opinion of the police officer enough of evidence is not obtained to secure a conviction, he will not hesitate to bolster up his case with false evidence Sometimes this leads to an innocent man being prosecuted through police mistakes *More often perhaps, it leads to guilty persons escaping through the suspicion thrown on the police evidence* Many a good case has been ruined in this way" (paragraph 26)

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20 What I have said above is well illustrated by the results of trials of Englishmen for the murder of natives before English juries, which are so constantly the subject of not unreasonable animadversion Racial prejudice is no doubt not wholly absent, and in some cases the verdicts have been downright perverse But I believe that in the great majority of cases they are honest The jurors are not accustomed to native ways and character, and they are incapable of the sifting process which I have described A feeling of profound distrust is engendered by the obvious falsehood of parts of the evidence, and they reject the whole as evidence upon which it would not be safe to hang a dog

21 Yet it is upon such evidence that Indian Magistrates have to convict and sentence, if crime is not to go wholly unchecked It is clear then that the maxim that the accused must always have the benefit of the doubt bears a somewhat narrower interpretation in India than in England There are few criminal cases in India in which reasonable doubt is not possible, and the room for doubt is often greatest when the evidence is amplest, most positive, and most consistent The charge may be wholly false, and still more often the charge may be true, and the evidence wholly false The fact is that, unless crime is to go wholly without punishment, the Indian Magistrate must be content with a lower degree of assurance of the guilt of the accused than would satisfy his English brother

22 It follows that innocent men are punished more often in India than in England, as a necessary and inevitable result of the conditions, if crime is to be punished or repressed at all In India, at any rate, it is as important that the guilty should not escape punishment, as that the innocent should not suffer unjustly The English maxim that it is better that 99 guilty should escape rather than that one innocent man should suffer, would not be tolerated for a moment, even in England, if those figures bore any practical relation to the facts It only holds good, because in actual practice the figures are reversed, because in England the precautions which are necessary and sufficient to save 99 innocent men result in the escape of only one guilty man And this is so because the whole community are interested in bringing a guilty man to justice, and because false evidence for the prosecution is virtually unknown In India this is not the case I have known a Sessions Judge so obsessed by his consciousness of the untrustworthiness of Indian evidence that he *never* hanged a man His feeling was intelligible, and not wholly unreasonable, but he was unfit for the Indian bench Immunity for the innocent may be purchased at too great a cost to the community, if it involves immunity for the guilty also It is curious how little resentment a mistaken conviction arouses in the native mind, so long as there is no suspicion of bias or corruption on the part of the Judge It is accepted as the *kismat* of the accused

23 I must not be taken to mean more than I do mean I do not mean that prosecutions upon false charges or wrongful convictions are of constant occurrence, I do not mean that Magistrates do or ought to convict recklessly in order to strike terror into evil-doers I believe that, on the whole, our administration of criminal justice is righteous and fairly successful; that as a rule the right man is placed in the dock that wrongful convictions are greatly the exception, and I am very certain that the number of guilty who escape punishment owing to the restrictions imposed by our English system upon our courts of law, is infinitely greater than the number of innocent who are wrongfully sentenced owing to the peculiar conditions which obtain in India* What I wish to insist on is that English standards are not suited to India, and that their strict application would paralyse the administration of criminal justice In the present state of criminal justice in India, it is quite as important (and more difficult) to secure the adequate punishment of the guilty as to prevent the punishment of the innocent

The Police Commission write—"It is generally admitted that the majority of the accused sent up to the police are guilty, and that under most circumstances the desire of the police is to find the guilty person, though they are too prone, sometimes without due regard to the character of the evidence, to make out a case against suspects" (paragraph 30)

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* See my marginal note to paragraph 19 above
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24 So, again, the duties of the Magistrate in India are different from what they are in England In England he sits to adjudicate upon what is placed before him In India he must do much more than that if he performs his duty fully If justice is to be done (in which term I include the punishment of the guilty as well as the protection of the innocent) he must

actively strive to get at the real truth of the case, whether for or against the accused In the vast majority of criminal cases in India neither party is represented, and it is the business of the Magistrate to be counsel both for the prosecution and for the defence Our criminal law already recognises the necessity, for it gives the Magistrate wide powers, not only of control over the preliminary police inquiry, but also of supplementary inquiry after the accused has actually been brought to trial In the more serious cases, triable by a Court of Sessions, where such action is practically impossible provision is made for preliminary inquiry by the committing Magistrate.

See Mr Justice Candy's remarks as quoted in paragraph 5 of the Bombay letter.

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25 Again, an English Magistrate must not allow himself to be influenced by any knowledge that he may possess outside the record In India it is often necessary for the protection of the innocent that he should be so influenced, and such knowledge is often invaluable to him in estimating the value of evidence and in avoiding being made the unsuspecting tool of private enmity. A Magistrate, in India as in England, is bound not to allow such knowledge to prejudice him against the accused, and to convict him, if at all, only on the sworn evidence which is produced in Court. But in India he is equally bound to utilise all his knowledge, however obtained, in order to avoid a wrongful conviction; to acquit in the face of the most complete evidence of guilt, if he has good reason to believe that the evidence is manufactured, and the charge a false one I have tried many hundreds of cases, with power to sentence up to seven years, and my experience is that no magistrate does his duty by a man accused of serious crime, who does not study the history of the police inquiry minutely, and especially scrutinise the manner in which each witness first appeared upon the scene, and the statements, he then made to the police The police diary is not evidence in the case, it must not be used against the accused, but the Indian Law (section 172, Criminal Procedure Code) makes special provision for its being used for him, and even if it did not, it would be the Magistrate's duty so to use it * In parts of the Punjab where party faction is rife, a knowledge of how the factions run will not unfrequently lead a Magistrate unhesitatingly to discharge the accused in certain cases, not because he may not be really guilty, but because the risk of the whole evidence being false is too great to accept Generally speaking, the man who knows most about his district and his people is the best Magistrate, and the most likely to mete out justice to the guilty and the innocent alike It may be argued that a magistrate who will allow himself to be influenced in favour of an accused by knowledge thus gained will also unconsciously allow himself to be similarly influenced against him I do not admit the argument But even if it should be true in some small measure, the balance remains on the side of justice and the right

Instances of what I mean are given by Mr Nicholson in paragraph 8 at page 44, and Mr Wynch in paragraph 8 at page 59 of the Madras papers See also paragraph 10 of the opinion of Mr Thomson, Member of Council, at page 26 of the Madras papers

DENZIL I[BBETSON]

II.—*The case for separation*

26 Such are some of the reasons why I hold that it is unsafe to apply English standards to India, and that it is unwise to alter a system which has undergone the test of 40 years' experience, merely on the ground of theoretical imperfections, and unless it can be shown that it has worked badly in practice and has led to evil and injustice And even if this be shown, the question will remain whether what it is proposed to substitute for it may not lead to greater evil and to greater injustice And let me once more insist that impunity to the criminal is no less injustice than the conviction of the innocent, and that while the latter is injustice to the individual, the former is injustice to the community at large

27 Now let us see what the case against the existing system is, so far as it rests, not upon abstract theories of what should be, but upon concrete instances of what has been In the main it rests upon the 19* cases collected by Babu Manmohan Ghose and set forth in Appendix B to the memorial which was first published in July 1896 The Babu had been practising as a criminal barrister for thirty years, and largely in cases from the mofassil He has spent them in a province of which the native press is ever on the watch to take up cases against Government and its officers, and in which there are native pleaders in every court He states in his "Interview," which is printed as Appendix A-II to the memorial, and which evidently greatly influenced the memorialists, that the evil of which he complains has arisen "in recent years," or more specifically "within the last twenty years" Sir H Prinsep, who can speak from longer Indian experience than any other man living, is of opinion that such cases are "less frequent than they were fifteen or twenty years ago." The Babu's cases date as follows —

* No 7 is blank

Pages 36 37—of Judicial Proceedings, March 1900, Nos 295—98

1874	1
1875-79	7
1880-84	2
1885-89	3
1890-94	4
Undated	2
Total	19

28 The records of these cases have long ago been destroyed, and we are unable to check the Babu's presentation of the facts But Sir Charles Elliot's criticism (with which, as a whole, we should be careful not to associate ourselves) shows that in some cases it is incomplete in material points, and that it cannot be accepted without examination, while some of the instances cited among the 19 cases clearly have no relevance to the matter in issue The memorialists assert that "these cases are but typical examples taken from a large number" (paragraph 16), though it is difficult to see how the greater number of them could have satisfied themselves of this fact In any case it may fairly be assumed that the strongest of the unpublished cases will not be stronger or more relevant than the weakest of those which have been published Now Bengal has 45 District and 575 Subordinate Magistrates If this is the strongest case than can be made out against this body of men, working for twenty years under the very special conditions which obtain in Bengal, the case for change, as based upon practical abuses resulting from the present system, is hardly entitled to a hearing

The Bengal officers, who remember the cases, indicate that many of them relate to the same officers Mr Slack (page 30) says "apparently 15 out of the 20 cases are the work of six officers" Mr Fauder says (page 90) "unless I am mistaken, one man is responsible for 4 cases, and four or five others for 2 each" Mr Bolton (page 136) attributes 10 of the 19 case to four officers These facts our friend Mr Ghose keeps in the background

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29 For the conditions in Bengal are very special, and the fact must never be forgotton in considering this question In all other provinces of India the Executive Government is carried on by the machinery and through the establishment which is provided for "revenue" purposes; and the police have no part or lot in the general administration of the district In Bengal, owing to the permanent settlement, no such machinery exists, and the result is that, the police being the only agency which ramifies over the whole district, the District officer has to employ them as the only available means of collecting information or of getting anything done The results are twofold In the first place the District officer is brought, as the Police Commission point out, into much closer and more constant relations with the police than in any other province The second is, that since the powers and functions of a police officer are regulated by law, the District officer who desires to use them (in default of any other agency) cannot move without a section at his back, is apt to issue orders which are in their nature executive, and in themselves quite legitimate, under legal provisions which do not apply, and thus affords a *locus standi* to the Courts, who are justified in condemning his action as illegal and an abuse of his authority as a Magistrate The police are neither intended for not adopted to executive work, and their employment for the purpose is dangerous, and engenders an official habit which does undoubtedly tend towards abuse

Bengal is, I believe the only province in India where organized force is habitually employed in connection with land disputes, and the Police Commission speak (paragraph 25) of "illicit gains which are almost incredible" made by the police in this connection

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The annual agricultural statistics of Bengal are based upon estimates furnished by the police!

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Paragraph 122 of report

30 But Man Mohan Ghose says that he "has good reason to believe that his remarks (in his "Interview") apply generally to the whole of India" We asked the whole of India what their experience was as to "how far the combination of executive and judicial functions in the same hands actually leads to abuse, whether there is any practical evil to be remedied, and, if so, of what nature and degree" We also asked them for "a definite statement of all the cases of abuse which have come to the knowledge of the Local Government or the High Court during the last five years" The results of the latter inquiry are summarised in paragraph 12 of Mr. Hewett's note, and in considering them it must be remembered that there are in India 253 Districts and 3,450 Subordinate Magistrates In reply to the former inquiry, every Local Government testifies that there is no practical evil of the slightest importance, and officer after officer, judicial as well as executive, barrister as well as civilian, including many of those who, on abstract grounds, advocate separation, speaking, not only of the past few years, but of the experience of his whole service, states his inability to recall any instances of abuse The combination of functions is most complete in Burma, yet that province furnishes only two instances of abuse, one of which is of a trifling character If the case for change, as based upon specific instances of the evils of the present system, is weak in Bengal, it is not too much to say that it does not exist in other provinces

31 In any case, Mr Ghose presents only one side of the question Mr Giles (late Commissioner in Sindh) writes on page 64 of the Bombay papers "These cases undoubtedly afford serious examples of a District Magistrate's showing prejudice, and using his powers despotically But what about the countless cases in which he has used them and his knowledge wisely, has withdrawn or transferred cases because he knew that only by so doing could justice be done, has advised a subordinate to inflict a reasonable and not an excessive punishment; and has taken steps to render powerless the intrigues and falsehood which, ever in the East, tend to divert the course of justice, and has, in fact, done all he can to secure peace, to uphold the right and prevent the wrong?"

32 But the memorialists assert that, apart from actual miscarriages of justice, the present system "creates opportunities of suspicion, distrust, and discontent, which are greatly to be deplored," and that it "is objectionable on the ground that, so long as it exists, the general administration of justice is subject to suspicion, and the strength and authority of Government are seriously impaired" It this were true, it would be a weighty ground for change.

Memorial, paragraphs 12 and 13
Pages 30-31 of Judicial Proceedings, March 1900, Nos 295—98

They go on to say that it is "condemned, not only by the general voice of public opinion, but also by Anglo-Indian officers" (paragraph 1) and that it is "deplored and condemned by independent public opinion in India" (paragraph 17) They appeal to the general opinion, both of Anglo-Indian officials and of the Indian people which is "so well known as to require neither proof nor illustration" and I am content that they should be judged by it The papers before us contain the verdict It is summarised, somewhat ineffectively, in paragraph 13 of Mr Hewett's note Even among the Judicial officers consulted, 31 are in favour of and 33 are opposed to complete separation, though 4 of the latter support it as applied to the Subordinate Magistrates only Executive opinion is almost unanimously against any radical change, though minor evils are pointed out, and minor reforms suggested Of the opinions in favour of separation, most are avowedly based upon theoretical objections to the principle of combination upon the conviction that it must lead to evil, rather than upon the fact that it does do so And if the numerical weight of authority in favour of the present system is striking, it is overwhelming if opinions are weighed instead of counted, and if experience of the country and the people and of their administrative necessities is allowed due weight In all provinces officer after officer who is qualified to judge by long experience of the people testifies to the feeling of the masses upon the subject, that they regard the District Magistrate as their protector against the vagaries alike of the police and of the Subordinate Magistracy—"not" (to quote Mr Justice Stevens) "as an oppressor, but as their friend and protector, and the redresser of their wrongs"—and that they would view with dismay any change in their present relations As Mr Munro, speaking from absolutely unrivalled experience, says at page 51 of the Bengal papers "The people of the districts of Bengal *assume and take it for granted that an Englishman is just* When they have this opinion of their own countrymen, it will be time to think of separating the two functions"

These are Mr Hewett's figures I make them 27 and 36

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Hon'ble Mr Arundel asked me to have a table prepared, showing the nature of the service of the High Court Judges who have expressed opinions It is being made out, and will be appended to this note

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38 No direct attempt has been made to consult unofficial native opinion on the subject, except in the United Provinces, and there the results of the reference to it are striking They are reviewed at some length in paragraph 8 of the Government letter Sir A P MacDonnell writes "The talukdars of Oudh, as a body and individually, are opposed to separation, and the influential landlords of the North-Western Provinces are on the same side The necessity, in the interests of law and order, of a strong Government, is recognised by all persons of local influence * * * The supporters of separation are, it may almost be said, gentlemen of the legal profession, or gentlemen who draw their inspiration on this question from English, and not from Indian, sources, and are, in number altogether insignificant * * * * Although all classes of society have been consulted on the proposals made in the memorial, and it must therefore have become matter of common knowledge that such proposals were under discussion, there has been as yet no sign of any attempt in the native Press or on public platforms in these provinces to agitate for the reform" Indeed there is abundant evidence in the papers to show that a great number, if not the majority, of those consulted had never even heard of this "burning topic of the day" I regard the native opinion of the United Provinces as of special value, as that province is, probably more than any other, full of influential, educated and enlightened native landowners, who have not, as in Bengal, been tied to the chariot wheels of Congress and "the advanced party" Sir John Woodburn, an officer of quite unusual knowledge of and sympathy with the native, and with experience of three provinces, writes (paragraph 11 of the Bengal letter) —

For details see pages 58, 64—5, 73, 82—91, 103—4, 142—5, 154—5, 169, 177, 179—80, 195, 197—205, 228, of the United Provinces papers

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"It is to the District Magistrate, not to the District Judge, that the peasant appeals for the remedy of every wrong and the redress of every grievance This is the voice—the voice, however of a fearless confidence—that he who hath ears to hear in India recognizes universally The Indian National Congress may speak with another voice But they are themselves perfectly conscious that they are in no sense representatives of the people They are a knot of platform gentlemen to whom we listen good-naturely, and sometimes quite seriously and sympathetically, but they say not what the people say, but—which is quite different—what they want the people to say"

34 The only non-official English opinion that we have is that of the Secretary to the Behar Indigo Planters' Association, a planter of 37 years' standing (see page 69 of the Bengal papers), who regards the proposed separation as "most unwise if not dangerous" But we may be quite certain that influential bodies of Englishmen, who live in the districts and among the people, such as the planters of Behar, Assam, or Madras, would be the first to make their voices heard if they felt that their liberty was threatened or infringed by a system which conflicts with English precedent

35 The fact is that, as pointed out repeatedly in the present papers, the movement in favour of separation is mainly artificial, and is wholly confined to the educated classes To speak of it as supported by "public opinion," if by "public" is meant the people whom we have to govern, is simply absurd It was "made in Bengal," and, as those of us who study the native press are aware, is still confined, in its effective form, to that province; though a parrot-like repetition occasionally finds its way into the other papers, as any stock that will serve to beat Government with is passed from hand to hand It probably took its origin in the delight with which the Bengali mind seizes upon abstract principles evolved in England, and applies them to the wholly different conditions of India But it was capable

of a practical application, the value of which two classes were not slow to perceive—those who would be glad to see the ranks of the Subordinate Magistracy filled from the native Bar, and those who are permanently in opposition, and would welcome any measure that would weaken the executive authority and prestige of Government As Mr Thomson, Member of Council in Madras, writes— the whole agitation is "only part of the programme to reduce existing authority, and the authority of the European in Chief, in order to throw more power into the hands of the class that live by the law and litigation, and I think that the country itself has no notion of any ailment, nor any desire to be more vakil-ridden than it now is"

36 Nor must it be imagined for one moment that the separation would put an end to suspicion and accusation As Kunwar Bharat Singh, a United Provinces Judge, says in a passage which is worth reading (page 117 of United Provinces papers) "All Judges will after a time, have to come under the same sort of suspicion, because they are appointed by Government Don't they say at present that Sir Arthur Strachey is now Chief Justice because he upheld Tilak's conviction and that Mr Chamier is now the Public Prosecutor, and a likely candidate for a Judicial Commissionership or a High Court Judgeship, because he interested himself in State prosecutions against Indians They have learnt the lesson that constitutional agitation is all that is required in these days, and what is done is done for that sake"

37 The minor objections which are taken to the present system, and are set forth in paragraph 12 of the memorial, can be very briefly disposed of I have already explained why I consider (ii) to be the very converse of the truth There is truth in (ii), and I agree that in the case of the District Officer at least, it is necessary to relieve him almost entirely of judicial work (though not to deprive him of judicial powers) because his executive work suffers if he exercises them extensively But (v) is opposed to all my experience One of the strongest arguments for limiting the amount of judicial work to be performed by executive officers of every class is, and always has been, that when there is not sufficient time for both, it is the executive work that goes to the wall, the reason being, that judicial work admits of comparatively effective check by means of returns which at once disclose any slackness in its disposal, while the miscellaneous duties which appertain to the executive officer are not susceptible of such treatment And, as the Bombay Government point out in paragraph 16 of their letter, "infinitely greater delays" attend the disposal of civil business by separate courts Number (iv) is simply a particular case of (i), and, as we have seen, is more plausible in theory than it is weighty in practice Number (vi) I will deal with separately (paragraph 87 below) There is truth in (vii) unless care is taken to make proper arrangements, and officers are sometimes careless in the matter But, on the other hand, the people are saved great trouble and inconvenience by criminal cases being made over to officers going on tour in the neighbourhood; and there are certain classes of cases (*e g*, those of bad livelihood) which can only be properly inquired into on the spot If proper care is taken, the only people who suffer from tours are the pleaders, who lose custom. And the objection does not come with a good grace from those who (in endorsing Mr Dutt's scheme), propose to double the area of criminal jurisdictions, and therefore the distances which the people have to travel to the Courts Number (viii) again is covered by number (i), and has already been examined I have fully stated my views, in the earlier paragraphs of this note, upon the concluding arguments of the paragraph I agree that a Magistrate should be an expert, but he will find his best training in the villages and among the people, rather than in a police court What is wanted in an Indian Magistrate is not legal learning, but sturdy common sense and knowledge of the people in their every-day life

38 It will be advisable, in addressing Secretary of State, to examine briefly the authority of the memorialists to speak in the matter, and the nature of the memorial to which they have lent the weight of that authority Of the ten signatories, one (1) has, I believe, never been in India at all, another (2) was there only as Legal Member of Council, the experience of seven (3) out of the remaining eight was wholly judicial, and in the case of four (4) of them (probably five, but I can find out nothing about Sir Charles Surgent) was wholly gained on the High Court Bench, while four (5) of them retired before 1880, and, therefore, before the "recent years" during which, according to Man Mohan Ghose the evils which he complains of developed Mr Reynolds is the only one of them who had any executive experience, and he and Sir William Wedderburn and possibly Sir John Scott, regarding whom I have no information, are the only ones who had an opportunity of gaining any knowledge of the people or of the manner in which they are governed outside the limits of a presidency town

(1) Wilson
(2) Hobhouse
(3) Scott, Sargent, Garth Couch, Markby, Phear, Wedderburn
(4) Garth, Couch, Markby, Phear
(5) Couch, '75, Phear, '76, Hobhouse '77, Markby '78

Mr Oldham's description of Mr Reynolds at page 108 of the Bengal papers is interesting
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39 As for the contents of the memorial itself, I would criticise them somewhat on the lines of paragraph 8 of Mr Luson's note of 6th September 1899 and of the draft despatch which was based upon it, being careful, however, to deal with material points only In paragraph 3 of their memorial the memorialists quote in support of their case an extract from a minute by "Mr F J Halliday (afterwards Sir F Halliday, sometime Lieutenant-Governor of Bengal and Member of the Council of the Secretary of State)" This is *too* barefaced I would give, as an appendix to the despatch, the long

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quotation which is given in paragrah 7 of Mr Bolton's opinion (page 131, Bengal papers) from a minute recorded 18 years later by Sir F Halliday, as Lieutenant-Governor of Bengal, in which he strongly opposes the separation now proposed, with the remark "I am especially desirous of raising my testimony in this place—the rather perhaps that, in the days of my smaller experience, I myself have held and advocated the opinions which I now very heartily condemn" The memorialists remark —"It is true that Mr Halliday, 18 years later, held a different view * * * but his personal change of opinion does not affect the force of his former argument"

40 The papers which are printed as appendix A to the memorial throw much light upon the animus with which some of the signatories signed it An "Interview" with Mr Man Mohan Ghose was printed in the issue of "India" for December 1895, in which that gentleman brought an accusation of wholesale dishonesty against District Magistrates and an insinuation of the same against local Governments, in two passages which I have marked A and B The "Interview" was sent to certain distinguished gentlemen, including some of the memorialists, and their comments upon it are printed in the Appendix Lord Hobhouse "has, however, nothing to say but generalities," though he puts the question for decision in words which we shall all accept (quoted in paragraph 7 above) Sir R Couch says that things were all right in his time, but that if what Man Mohan Ghose says is now true, it is a bad business Sir John Phear "perceives from Mr Ghose's statement" that things are not as they should be Sir William Markby indulges in mere generalities The fact is that the signatories for the most part swallowed Mr Man Mohan Ghose whole, their answers to the reference of 1895 committed them on the general question, and unfortunately they accepted the draft of a memorial without examination, for it is out of the question that men of their character and position should have knowingly made themselves parties to anything so dishonest

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See also a comparison of these opinions with the memorial by Mr LeFanu at pages 33 to 35 of the Madras papers

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III —*Detailed objections to separation*

41 Having thus examined the case against the existing system, I turn to the objections which may be urged against the proposed separation And in order to do this effectively, I must distinguish between the different functions of the District Officer He exercises—

They are well summarised in paragraph 14 of Mr Hewett's note

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(1) executive control over the police, as the head of the district police

(2) control over police investigations—

(*a*) in his executive capacity, as above,

(*b*) in his capacity as a Magistrate, under the provisions of the Criminal Procedure Code

(3) magisterial powers for the prevention of offences under Part IV (Chapters VIII to XII) of the Criminal Procedure Code

(4) magisterial functions in original cases

(5) control over the Subordinate Magistracy—

(*a*) in his capacity as their executive superior;

(*b*) as the Chief Magistrate of the district,

(*c*) as an Appellate Court

42 The memorialists entirely fail to distinguish these several powers, and it is impossible to be certain which of them they would dissociate from each other and from the general executive control of the district But I gather that they most object to original magisterial functions, and control over the Subordinate Magistracy, being exercised by the officer who controls the police and police enquiries, and is armed with general executive powers

43 As to the District Magistrate's control over the police and police enquiries, the first point to be noted is that the system which is attacked in paragraphs 3 to 10 of the memorial under which the same officer is "thief-catcher, prosecutor and judge," and upon the iniquity of which so much stress is laid, has ceased to exist since 1860 Under that system the District Magistrate was also the District Superintendent of Police, there was nobody between him and the native police officers, the whole direct and detailed control of police working in all its branches was in his hands, and he was assisted in the work by the Subordinate Magistrate, who also combined police with judicial functions The inquiries of 1860 resulted in recommendations which are dishonestly garbled in paragraph 6 of the memorial, but are given in full in paragraph 8 of Mr Luson's note on the memorial A District Superintendent of Police was appointed in each district, who undertook the immediate direction of the police working The Subordinate Magistrates were deprived of their police functions, but a power of general control was reserved to the District Officer, as it was considered to be "at present inexpedient to deprive the police and public of his valuable aid and supervision in the general management of police matters" The quotation

The history of police organization in India is summarised in Chapter I of the Police Commission's Report

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by the drafter of the memorial of the discussions of and previous to 1860, as if they applied to the existing system, is disingenuous, if not dishonest Sir Henry Prinsep, who is the only man left in India who remembers the old system, describes it and contrasts it with the present system in his Minute

44 The whole subject of the relations between Magistrates and the police is discussed at length by the Police Commission in Chapter VI (page 76) of their report, and we could hardly have a more weighty judgment They are emphatically of opinion that the control of the police must remain with the District Magistrate (see especially paragraph 123) They write in paragraph 80, "the fact that the District Magistrate and his subordinates in their revenue and other work are in some provinces brought into the closest contact with the people, accessible to them and well acquanted with them, has tended greatly to prevent abuse in the police as well as in other Departments" It is agreed by almost all consulted that to withdraw the police from the control of the District Magistrate would certainly lead to intolerable abuse, and that it is to him alone that the people can look for protection against a powerful, an under-paid, and a corrupt agency Mr Justice Ghose (Calcutta) rejects the proposal to relieve him of his duty "as head of the police, in view of the strict supervision that the police still requires," and I think this is the general view, even of those who advocate separation Indeed many of them advocate it, partly on the ground that it would enable the Collector to exercise a closer control over his police, as to which, see paragraph 74 below In Madras the common complaint (in which the Inspector-General of Police joins) is that the District Magistrate's control over the police is insufficient, and in the United Provinces Sir Antony MacDonnell is of the same opinion It is true that, so long as executive functions and police powers are combined in the same hands, the potential evils of which the memorialists complain will not be wholly removed But it is certain that their separation would result in far greater actual evils, and that in the present state of affairs an independent police department is out of the question When the regenerated police which is contemplated by the Commission is fully constituted, such a measure may be possible, but that we must leave to our successors

I have ascertained that the last sentence of paragraph 121 is intended to apply to interference in the internal administration of the police force, and not to interference in criminal inquiries, though I understand that, in Bengal alone, it would be to some extent true of that also

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As Sir H Prinsep points out, the "Maeguire case" was an instance, and he "believes it to be the first and only case of this description"

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45 As regards the powers of control over police investigations which the law gives to the District Magistrate, I believe I am right in saying that it is no greater than that given to every Magistrate who exercises first class powers It is summarised in paragraph 124 of the Police Commission's report It has been deliberately conferred by the Legislature as necessary for an efficient criminal administration, and I do not understand that it is proposed to revise or diminish it

46 It is to his power of interference with the conduct of police inquiries in his executive capacity—or rather, to the combination of that power with the power of trying the case himself afterwards—that real objection is taken Now, to read what is written on the subject, one would imagine that the District Magistrate was in the habit of personally directing the course of police inquiries But, as every local Government points out, nothing is further from the truth I understand that in Bengal he interferes in such matters far more freely than in other provinces Yet Sir Henry Prinsep, speaking with unrivalled experience and very special knowledge of the Indian law of criminal procedure, points out (pages 3 and 4 of his Minute) how utterly mistaken such an impression would be even if confined to Bengal, and local Governments are equally emphatic in repudiating it as applicable to their provinces The simple fact is, that the Collector of a District is far too busy to do anything of the sort If he has a capable police officer, he hardly ever interferes at all In any case he practically never interferes except in the most serious cases, which are triable only by the Court of Sessions, and therefore never come before him in his judicial capacity And, in my experience (and others say the same), he interferes quite as often to protect a suspected person who he thinks is being unfairly treated by the police, as for any other purpose As Sir Thirkell White, writing as Judicial Commissioner of Upper Burma, the least "advanced" province in India, says "The District Magistrate as head of the police does not, as a rule take a personal interest in the detection of crime any more than as head of the Forest Department he personally marks trees for girdling" It is true that, in non-regulation provinces like the Punjab, where the District Magistrate exercises powers under section 30, Criminal Procedure Code, and partly takes the place of the Sessions Court, he does try more serious cases, in the course of the investigation into which he may have given directions to the police But it is not from these provinces that our complaints come In any case, if he is to have any effective control over the police of his district, that control must extend to the performance of their duties

47 And if it is true that the District Magistrate rarely interferes with the conduct of a police inquiry, it is equally true that, except in the Punjab, he makes but little use of his judicial powers (see the figures in paragraph 18 of Mr Hewett's note) I would gladly see him make even less use of them, especially in Bengal, and I am quite ready to accept Mr Hewett's suggestion that he should be, as far as possible, relieved of section 30 cases, and that he should be directed by executive order to confine himself mainly to certain classes of cases.

48 But there are certain classes of cases that he *must* try It must be remembered that in a very great number—I believe in the great majority of Indian districts—the District Magistrate has no European assistant, or only one without experience, while about half our districts are without a resident Judge Now criminal cases occur from time to time which must be tried by a European if justice is to be done, or, what is quite as important if the people are to be satisfied that justice will be and has been done Mr Hewett enumerates, at the end of his paragraph 18, certain classes to which these cases belong, but he seems to imply that all cases falling under any of these classes should be tried by a European Magistrate This is by no means the case The cases which require special treatment are those in which any considerable racial or religious feeling has been aroused, in which the position and influence of one of the parties is likely to overawe the Magistrate, and so forth It is impossible to frame any general description which shall define the cases in question, but it is not difficult to recognise the individual cases as they arise There are also certain cases which the law directs that he *shall* try, such as sedition, rape upon a child-wife, and so forth And Mr Justice Chatterji points out, at page 33 of the Punjab papers, that if he "is to retain his criminal powers, he must, in order to be an efficient Magistrate, be able to advise his subordinates and to supervise their work, keep up his knowledge of the procedure for trial of original cases and the habit of deciding them This consideration must, I think, outweigh every other" Moreover, the trial of serious cases affords him a valuable means of insight into the working of his police

49 If, however, the District Officer is to retain both his executive and his judicial powers, the fact remains that, whatever his practice may be, he *can* interfere in the police inquiry in any particular case, and, having so interfered, he *can* proceed to try the case himself As we have seen, this power has been but seldom abused in the past, and the existing law contains special precautions, which are enumerated in paragraph 17 of Mr Hewett's note (see also page 2 of Sir H Prinsep's Minute), for preventing or remedying such abuse To these Mr Justice Ghose (Calcutta) proposes to add a provision that a District Magistrate should be precluded from trying any case—

(1) in which he has had anything to do with the police inquiry or operation, or

(2) in which he directs a prosecution, or

(3) in which he acts upon his own knowledge or suspicion, or upon information from any other person,

and Mr Justice Chatterji (Lahore) proposes that "any Magistrate who has given directions to the police in the course of the inquiry held by them in any criminal case or in regard to any particular accused shall be disqualified from trying the case if the accused, or any of them, objects"

50 Mr Ghose's case (3) is already sufficiently covered by section 191, Criminal Procedure Code, which provides for the accused being given an option He will often prefer to be tried by the District Magistrate In case (2), sections 487 and 556, the latter of which, as Sir H Prinsep remarks, "has always been liberally interpreted by the High Court," probably do all that is necessary A Magistrate who holds a preliminary inquiry under section 159 or 202 with the express object of ascertaining whether there is a *primâ facie* case, or a Sessions Judge who directs a commitment under section 436, is not and should not be debarred from trying the case But I see no objection to extending section 556 to cases in which the Magistrate has directed a prosecution *in his executive capacity*, if it does not already cover them In principle I am prepared to accept the suggestion as regards case (1) in the form in which it is put by Mr Chatterji It is reasonable to provide that when a Magistrate has taken such a part in the police enquiry as to indicate that he has already formed an opinion as to the guilt or innocence of the accused, or when, as the Police Commission put it, he "has in any case been compelled to assume practically the part of the police officer," he shall offer the accused the option provided for by section 191 In practice, I see two difficulties In the first place, I do not see how to frame the provision without leaving it open to a pleader to object to the jurisdiction if the Magistrate has passed almost *any* sort of order on the police papers, for instance, the issue of a search warrant And in the second place, in the special cases referred to in paragraph 48 above, which should be tried by an English Magistrate, it is equally important that the police investigation should be carefully controlled, and the whole inquiry watched by such a Magistrate In such cases, to forbid a District Magistrate to try would generally mean that he himself must commit the case, and to use a District Magistrate as a committing Magistrate is such sheer waste of power, as I do not think we should accept, merely in order to meet objections which have little practical weight.

51 The memorialists have wisely avoided all reference to the preventive powers which are conferred upon Magistrates by Chapters VIII to XII of the Criminal Procedure Code. It is inconceivable that the head of the district, the officer who directly represents Government to the masses of the people, and who is directly responsible to Government for the peace of his charge and for the welfare of its inhabitants, should be deprived of those powers They are essential to the due discharge of his duties

52 There remains the control exercised by the District Magistrate over the Subordinate Magistracy who dispose of the great mass of criminal cases throughout the country, and by whose working, therefore, the people are most affected And here I understand that it is not

so much the exercise of the power of judicial control provided for by law that is objected to, as the fact that the inferior Magistrates are the subordinates of the Collector, both in their judicial and in their executive capacity Objection has indeed been taken to the power of distributing the criminal work, and of withdrawing a case from the court of one Magistrate and transferring it to another, on the ground that it may be exercised with a view to procuring conviction in particular cases But some such power is absolutely necessary in order to secure a due distribution of the work, to ensure that the most difficult and important cases are tried by the most competent officers, and to provide for occasional cases in which special circumstances make it in advisable that they should be tried by a particular Magistrate Speaking generally, it is clear that somebody must control the inferior Magistrates, and in order to justify a transfer of control from the Collector to the Judge, it must be shown that the former is more likely than the latter to abuse his influence over them So far as any tendency to interfere in cases in which they are personally or officially concerned goes, there is clearly nothing to choose between them My own belief is (and there is much in the papers to confirm it) that the better class of educated natives with whom we have for some time past been manning our Subordinate Magistracy, are intensely jealous of their judicial independence, and that any attempt to influence their decision in a particular case would be very likely to have precisely the opposite effect to what was intended At the same time, it is inevitable that there should be strong temptation to defer to the wishes, known or suspected, of the officer upon whose reports the Magistrate's official future depends, and this fact is recognised by many of those who are opposed to separation But the fact would no less remain a fact if the Judge was substituted for the Collector, and the very knowledge that a subordinate may feel himself unable to resist pressure put upon him, will render honourable men careful to avoid even the appearance of a desire to influence him when he would be wrong to yield to such influence

53 There are two respects in which it is suggested that the Collector is more likely than the Judge to exercise undue influence over his Magistrates The first is that being, as the executive head of the district, interested in the working of such departments as Excise, Salt, Forests, and the like, he may influence his Magistrates, either directly or unconsciously, to convict more readily and sentence more severely than they otherwise would have done in cases of offences against the revenue Of this suggestion the Government of Bombay write as follows —

> it is especially urged that officers who as Collectors are responsible for the collection of the revenue, cannot safely be trusted as Magistrates to deal with cases under fiscal Acts, such as those relating to Salt, Customs, Opium and Abkari Judged merely by general principles the argument is sound, but it is nevertheless fallacious, because it is based on an entirely false conception of the attitude of District Officers in this presidency towards matters connected with the revenue The District Officers are, generally, devoted to the interests of the people who are committed to their charge, and their devotion has frequently carried them to extreme lengths in opposing measures which in their opinion press hardly on the people There have been no more outspoken critics of land revenue settlement and forest settlement, and their voice has generally been raised in favour of moderate assessments and extended privileges It is not to be believed that officers who show this spirit in revenue matters with which they are closely concerned, would show partiality as Magistrates in dealing with cases relating to the Customs and Salt Revenue with which they have nothing to do, or the Opium and Abkari Revenues for which a separate Department is directly responsible

And the same view is urged by Mr Jenkins, Collector of Salt and Revenue, who speaks from much experience, on page 114 of the Bombay papers I quote the Bombay opinions, because that is the only province in which it suggested that the executive functions of the Subordinate Magistrates influence them in their judicial dealings with fiscal offences As I say below (paragraph 63), I have no doubt that District Magistrates do endeavour to correct the inveterate tendency of native Magistrates to undue leniency in such matters But the correction is sorely needed, and a Judge to whom the control of the Magistrates was transferred would do exactly the same, if he did his duty

54 I note, however, that Mr Hewett, at the end of paragraph 21 of his note, asserts the existence, in some provinces at least, of "a common practice" which cannot be too strongly condemned, and which should certainly be prohibited if it exists The Head of a Department is perfectly justified in calling the attention of the District Magistrate to cases in which he has reason to think that there has been a failure of justice, or that undue leniency has been shown. But it is intolerable that he should call upon the Magistrate, even indirectly, to explain or justify his action The District Magistrate will, after examining the record, make any comments upon it that he may think desirable for the Magistrate's future guidance Mr. Hewett's proposed rule, however, is far too general, as it would prevent the District Magistrate from criticising and asking for explanations concerning the conduct of any case which a Magistrate had decided, unless it happened to come before him either in revision or appeal—a restriction which would be clearly inadvisable

55 The second suggestion is that because the District Magistrate, as head of the police, may be supposed to be interested in the success of police working, therefore his Subordinate Magistrates have a tendency to convict in police cases simply in order to please him This is a new suggestion to me, which I do not remember to have seen in the memorial and its annexures, or in the native press, but which is put forward by some of the officers now consulted—chiefly, I think, in the United Provinces—though there is far more evidence of magisterial prejudice against than in favour of the police It seems to me so far-fetched as to indicate that its suggestors are hard pressed for arguments in support of their case. I know many Magistrates (as the Police Commission point out in paragraph 125 of their report)

who are strongly prejudiced *against* the police as such, and in whose courts it is difficult to procure a conviction upon evidence brought forward by the police But I never heard of a Magistrate who was prejudiced in *favour* of the police, or who was afraid to acquit a police case lest the District Magistrate should be angry with him, and I very much doubt his existence Sir Thirkell White, writing as Judicial Commissioner of Upper Burma, where combination of functions exists in its extreme form, says "It may be safely said that no Magistrate, in trying a case, reflects that the District Magistrate is head of the police, and inclines to conviction in consequence In this province the low average of convictions is evidence of this assertion" (page 29, Burma papers)

56 There can, at any rate, be no doubt that the Subordinate Magistracy are sorely in need of supervision and guidance They all have to be taught their work, many of them are ill-trained and incompetent, not a few of them are corrupt, and hardly any of them are free from failings which require correction Their tendency as a class is to reject private complaints indiscriminately, to discharge or acquit too readily, to pass suitable or inadequate sentences, and to be intolerably dilatory in their procedure And it must be remembered that public opinion exercises no control in India, as it does in England, over the procedure of the Criminal Courts I have already stated, in paragraph 6 of this note, my views as to the duties of the executive in the matter As a fact the District Magistrate exercises his control as such, and therefore in his judicial and not in his executive capacity But it is urged that because, as an executive officer, he is interested in and responsible for the peace of his district and the well-being of his people, therefore it is not fitting that he should be entrusted with the power in question

57 The local Governments are unanimously and emphatically of the opposite opinion; and not a few High Court Judges agree (see, for instance, the opinion of Candy, Stevens, Brett and Pratt, JJ) They point out that, by the very nature of the case, the Collector is far better fitted than the Judge to exercise a beneficial control, that the former is, indeed, the only officer who can or will exercise it, and that the transference of the duty of supervision to the latter will simply mean that the Magistrates will not be supervised at all The Judge will see those cases only which come before him in appeal or revision, and those discharges, wrongful acquittals, and inadequate sentences will never be brought to his notice A mere appellate court, sitting as often as not in another district, can never exercise effective control Indeed, the mere fact that he is the court of appeal, or, in sessions cases, the court of trial, will hamper him in his control of first class Magistrates, who deal with all the serious crime The Collector travels about his district, he mixes with the people, they come freely to him with their difficulties and troubles, and he knows what is going on In his frequent tours he has opportunities for that local inspection and examination of registers and record by which alone certain abuses can be detected and checked Inspection is, as Sir Charles Elliott (I think it is) says, "the very breath of his nostrils"

See paragraphs 9 and 10 of Mr Leslie Porter's opinion at pages 82-83 of the United Provinces papers for specific instances

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58 He is, moreover, intimately concerned in the good administration of his district in all departments The Judge is by nature sedentary, he cleaves to his bench like a limpet He deals with the matter which is placed before him, and there his interests end It is all very well to say that it need not be so It is so, and it is natural and inevitable that it should be so Everything in the district is the business of the Collector The business of the Judge is confined to what goes on in his Court It is notorious that the Civil Courts go practically without supervision throughout the country

59 It may be urged that the Civil Courts do very well, notwithstanding That is a matter of opinion, and many officers, including Judges themselves, speak of the absolute lack of supervision and control from which they suffer But even if that be admitted, the two cases are not analogous, and no argument drawn from the one can be applied to the other In civil cases both parties are directly interested in the result, no presumption exists in favour of either, and an appeal lies whatever may be the decision In criminal cases no one is personally interested in procuring a conviction, there is a strong presumption in favour of the accused, and, practically speaking, no appeal lies from a discharge or from an acquittal or from an inadequate sentence The executive Government is far more closely interested in the effective administration of criminal than of civil justice In the latter case it takes precautions to the best of its ability against corruption, undue delay, and incompetency, it provides for an appeal, and it then leaves the parties to look after themselves In the former case it is directly interested in the protection of the innocent and the conviction and adequate punishment of the guilty, for no one else is interested in those matters, and, at any rate so far as the guilty are concerned, the superior courts will not move of their own motion.

60 As for the arrangement by which the District Magistrate hears appeals from second and third class Magistrates, it is mainly a question of administrative convenience If he is to retain his executive and magisterial control, the mere fact that their appeals lie to him will not intensify the evils which the memorialists and those who think with them allege or anticipate On the other hand, the hearing of these appeals is a very valuable aid to the effective exercise of that control over the young and inexperienced Magistrates who are most in need of it, and it is on that ground only that I hesitate to accept at once the the suggestion that District Magistrates should be relieved of their appellate functions Apart from actual inspection on the spot, a District Magistrate has three means of exercising supervision over the inferior

Magistrate—the perusal of the weekly abstract of cases decided by them, the examination of the records of decided cases which are selected and sent for for the purpose, and the hearing of appeals from their decisions Of these three the last is perhaps the most valuable, because in an appeal the Magistrate is compelled to scrutinise minutely the whole record from beginning to end, and thus obtains a closer knowledge of his subordinate's work than is obtainable in any other way At the same time the cases are for the most part of the most trumpery nature The appeals could be efficiently disposed of by a selected first-class Magistrate, and save as a means of information, there is no doubt that the hearing of them by the District Magistrate is waste of power It is necessary that he should retain his appellate powers, because there will always be certain appeals which it is advisable that he should dispose of himself, whether because they are of the nature indicated in paragraph 48 above, or because the appellant imputes bias or worse to the Court of first instance But I am inclined to think that District Magistrates might well be directed by executive order to hear criminal appeals, only in cases in which such special circumstances exist The power of revision he should certainly retain He can pass no order of his own authority, and the power of reference is one of the most useful powers which he enjoys

61 The whole question of the relations between the District Magistrate and the Subordinate Magistracy, and of his portion with regard to his executive, police, and judicial functions, has been most carefully considered by the Police Commission, who have enjoyed exceptional opportunities of forming a just opinion in the matter They have formulated and justified their conclusions in paragraphs 123 and 129 of their report, I agree entirely both with their presentation of the facts and with the results at which they arrive, and I would beg my Hon'ble Colleagues to read these two paragraphs By retaining both executive and magisterial powers in the hands of the Collector, we ensure that executive aspect of the administration of criminal justice is not lost sight of, but at the same time exercise control which is absolutely essential to the efficiency of that administration through an officer who, being himself a Magistrate, exerts it in his magisterial capacity, thus avoiding all appearance of conflict between the two branches of the administration, and all semblance of interference with judicial independence

62 There remains the fact that the Subordinate Magistrates themselves combine both executive and judicial functions Since 1860 they have had no executive control over the police, and I do not understand it to be generally alleged that this combination is open to objection in itself, as leading them to subordinate their judicial authority to executive ends In their executive capacity they are merely agents, and there is no temptation to abuse their power But the combination is objected to because, so long as it exists, it necessarily involves the subordination of the Magistrates to the control of the Collector If the Collector is to retain his control as Chief Magistrate, this objection becomes meaningless But if it should be decided that the Collector ought not himself to discharge, or to control in any way those who discharge magisterial functions, it will of course be necessary to entrust executive duties to separate subordinate staff The experiment of entrusting magisterial duties to Civil Judges has been tried already in Bombay, and failed see the end of paragraph 17 of the Bombay letter.

63 From two provinces, however, there does come a suggestion that the combination of executive and judicial functions in the hands of Subordinate Magistrates does (or rather may, or must, for I think that is the form which the suggestion takes) lead to abuse, quite apart from the influence of the District Officer (See paragraph 21 of Mr Hewett's note) In the Bombay papers it is suggested that in fiscal cases undue severity is the result of the combination The case is perhaps put most forcibly by Mr Lely (page 104)

He writes —

"There is, however, one part of our district system which appears to me open to the gravest criticism, and that is the trial of offences under the Salt, Opium and Abkari Laws by Revenue Officers as Magistrates The Mamlatdar is before anything else a fiscal officer To give him criminal powers in such cases is parallel to giving a bench of excisemen jurisdiction to imprison for offences against the inland revenue Nay, worse, for the Mamlatdar is conscious of being watched by the Commissioner of Customs, a powerful officer who will hand him up to Government for any leniency which he may consider misplaced Considering how many of our local jails are crowded with prisoners under these laws, I cannot but feel the subject demands attention If injustice is rarely done, no credit for it is due to the system, but rather to the forbearance and sense of equity retained by high placed officers in the rôle of prosecutor"

I think the circumstances in Bombay must be peculiar It will be noticed that Mr Lely refers to the practice which I have already condemned in paragraph 54 In no other province is this complaint made, and my own experience is that one of the commonest failings of Native Magistrates is their unwillingness to inflict anything but the most nominal penalties for offences against the revenue, or for such offences as deliberately setting fire to a reserved forest in order to procure fresh grass They recognise that the offence involves no moral turpitude, and they fail to recognise that the offenders are gambling with the Government, that they are detected only once in many transactions, and that unless the pecuniary penalty of detection bears some reasonable proportion to the pecuniary gain of successful evasion, the process is an entirely one-sided one As I have already said, I regard general guidance in such matters as being emphatically the duty of the executive, though interference in the decision of a particular case would be most reprehensible.

64 In the United Provinces papers it is asserted, and mainly, if not wholly, by natives, who should know best, that Tahsildars occasionally use their judicial powers vindictively, in connection with their executive functions No other province makes the same complaint, and I think that no instances are given, but Tahsildars and their Naibs are the lowest class of officials who are invested with magisterial powers (almost always of the lowest grade), and I can believe that the assertion may be true

65 But the Tahsildar is the backbone of the administration, he is in his tahsil what the District Officer is in his district, and it is absolutely necessary to preserve his prestige and power unimpaired The effect of deprivation of magisterial power upon that prestige and power is discussed in paragraph 69 The experiments of deprivation have been actually tried in Madras, with the results described in paragraph 70 I find in the United Provinces complaints, another argument for the necessity of retaining the control of the Subordinate Magistracy in the hands of the District Officer, who alone can exercise it efficiently I am, however, on administrative grounds, entirely in favour of relieving the Tahsildar as much as possible of criminal *work*, though this will involve doubling the tahsil staff, for it would be intolerable that petty cases should not be disposed of within the tahsil itself

66 It is not clear whether the memorialists intend that the power of appointing, transferring, punishing, and promoting all Judicial Officers should be transferred from the local Government to the High Court, but it is evident from the passage marked B in Mr Man Mohan Ghose's "Interview" that he and his friends will be content with nothing less, and, indeed, nothing less would entirely free the judiciary from executive influence But that would amount to having two Governments in the same province

Page 38 of Judicial Proceedings, March 1910, nos 295—298

IV —*General objections to separation*

67 So far I have dealt with details But some of the most important considerations that tell against the complete separation of the executive and judicial agencies are of a general character The argument from "prestige" is dealt with in paragraph 17 of the memorial In his "Minute on the administration of justice in British India," Sir James FitzJames Stephen (himself a lawyer of distinction and an English Judge) wrote as follows —

"We must first of all ask—what is the object in view? And to this the answer is, to obtain as good a system for the administration of justice as is consistent with the maintenance of British power in India This condition is indispensably necessary to the maintenance of any regular system at all for the administration of justice, or for any other form of good Government

"It seems to me that the first principle which must be borne in mind is that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the natives would be dearly purchased even by an improvement in the administration of justice Within their own limits, and as regards the population of their own district, the District Officers are the Government, and they ought, I think, to continue so We must have all over the country real and effective Governors, and no application of the principle of division of labour ought, in my opinion, to be even taken into consideration which would not leave in the hands of the District Officers such an amount of powers as will lead the people at large to regard them as, in a general sense, their rulers and Governors

"If their whole judicial power were taken from them and confided in purely Judicial Officers, nothing would be left in their hands except miscellaneous executive functions The exercise of criminal jurisdiction is, both in theory and fact, the most distinctive and most easily and generally recognised mark of sovereign power. All the world over the man who can punish is the ruler. Put this prerogative exclusively into the hands of a purely Judicial Officer, who has no other relations at all to the people, and who passes his whole life in a court, and I can well believe that the result would be to break down in their minds the very notion of any sort of personal rule or authority on the part of the Magistrates

"I do not think that, situated as we are, the law can ever be carried out effectually, except in one of two ways, *viz*, either by the strong personal influence of Magistrates known to, and mixing with, the people, or by an enormously increased military force In a few words, the administration of criminal justice is an indispensable condition of all government, and the means by which it is in the last resort carried on But the District Officers are the local governors of the country Also it is necessary that the District Officers should have personal and friendly relations with the people But this, under the circumstances of British India, can be secured only by investing them with miscellaneous executive functions Therefore it is necessary, upon the whole, that the District Officers should both administer criminal justice and discharge miscellaneous executive functions"

68 All this has my heartiest concurrence The power to punish wrongdoing is, to the native mind, an essential attribute of the *hakim* or ruler I have seen it argued that, because a Commissioner enjoys prestige, although possessing no criminal powers, therefore a Collector's prestige would not be injured if he were deprived of those powers But a Commissioner derives his prestige from the fact that he is a picked Collector who is set over other

Collectors His own prestige depends upon that of the Collectors whom he controls Moreover, he is an abstract dignitary, far removed above all contact with the people The peasant will admit that the Commissioner is a higher official than the Collector But it is the latter, not the former, that he regards as his *hakim*, his personal ruler, with whom he is concerned, and whose powers affect his daily life

69 That is my own personal opinion But the papers from all Provinces *teem* with the expression of the same opinion, and the native opinion in the United Provinces to which I have referred in paragraph 33 above largely turns upon this point It is briefly summarised in paragraph 8 of the letter from Sir A P MacDonnell, who notes that there is "on the part of the native community a general apprehension of change, and a feeling that it would be a dangerous experiment to weaken the powers of the District Magistrate" The general opinion is fairly expressed by the Oudh Taluqdar, himself in favour of partial separation, who writes (page 83)—"the Deputy Commissioner or Collector deprived of all magisterial powers will be little better than 'nobody'" Nor is the opinion less uncompromising as to the effect of deprivation of magisterial powers upon the prestige and authority of the Tahsildars "Their influence will be like that of a kanungo, and friction will ensue at tahsils" "Even the influence of a Tahsildar will not remain over the public" It must be remembered that the proposal is to *withdraw* powers which have long been and are at present enjoyed With reference to this proposal, Mr Evans, the wisest and most experienced officer in the United Provinces, writes —

See further pages 20, 43, 64—5, 73, 83, 104, 140, 143, 144, 177, 224 of the United Provinces papers as regards both District Magistrate and Tahsildar

"No one who is cognizant of the position of the District Magistrate in the eyes of the native population, and of the feelings with which they regard that officer, could view without the gravest apprehension the enunciation by Government of the doctrine that that officer cannot be trusted to deal with criminal charges against an offender in his district, because it is feared that his judgment may possibly be so far warped by the sense of his executive responsibilities as to render him unable to deal with such cases as an honest and upright Judge, or, again, that he cannot be trusted to control the Magistrates subordinate to him without prejudice and without regard to justice to the offender Disguise the proposal as we may (even if this be not an accurate representation of the grounds on which it is based), that is the view which will be taken of such a policy by the natives of this country, accustomed as they have been for generations to regard the executive head of the district as the source to which they must look for the remedy of their wrongs Whether, then we look to the effect on the minds of the law-abiding or the law-breaking portion of the community, the effect would be disastrous"

70 Nor need we rely upon opinion merely Some ten or twelve years ago, the Madras Government not only relieved their Tahsildars of criminal duties (which is very advisable), but also deprived them of criminal powers The result of the experiment is discussed in paragraphs 14 to 17 of the Madras letter, which should be read, together with Mr Justice Benson's remarks on the subject at page 22 and Hon'ble Mr Thomson's at page 26 of the Madras papers It was disastrous to the prestige, and therefore to the efficiency, of the Tahsildars, and to the conduct of both executive and judicial work But there is another result, which is not mentioned in the papers, but which I know to be a fact, and which illustrates in the most forcible manner the light in which the people regard the question Since the tahsildars have been deprived of their criminal powers—and it must be remembered that these powers were always very limited—the people have nicknamed them 'water-snakes,' because water-snakes* have no fangs and no poison, and therefore no power of making themselves respected It will be an evil day for our rule in India, if ever fangless Collectors become the subjects of similar pleasantries We have to govern India with hands that are strong, and we must recognise that that strength will occasionally be misused The remedy is, not to destroy or curtail it, but to control it more efficiently.

* That is, freshwater snakes

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71 But there are other evils of a more concrete nature which will follow upon the separation which the memorialists advocate A purely judicial service, whose members pass their lives upon the Bench, is eminently unsuited to the administration of criminal justice under the special conditions which I have already described as obtaining in India They see only one side of the people, and that the worst, they view them with the eyes of a Police Magistrate, and they are without that broader and more intimate knowledge of them and of their ways which is acquired by an executive officer who is constantly coming in contact with them in all sorts of relations, and which is of the utmost importance in judging of the value of evidence and in sifting out the true from the false The man who knows the people best makes the best Magistrate The criminal law of India is codified in a simple form: and, as Sir A Trevor wrote in 1900. "For nine-tenths of the judicial work to be done in India, a man who to a fair amount of common sense unites a good working knowledge of the Indian Codes and the widest possible knowledge of the customs, character, and habits of thought of the people with whom he has to deal, including the police of the district, is better qualified than the most highly trained lawyer, taught to have no eyes or ears for anything but the evidence which the parties choose to tender" A separate service inevitably tends to become narrow and technical, to be the slave of its legal maxims

See also paragraph 15 of the Bombay Government's letter, and the opinions quoted there

instead of the master, and to confine itself to adjudicating upon the evidence and arguments which are brought before it In the higher branches of the judicial administration beginning with the Sessions Judge, this is less objectionable, since they deal with serious cases only, in which a complete investigation has already been made by the committing Magistrate, and in which Counsel are commonly employed But as I have already remarked, it is the duty of the Indian Magistrate to get at the truth, to see that the guilty do not escape, as well as that the innocent do not suffer, to act as Counsel both for prosecution and for defence

The Police Commission write (paragraph 124) "The intention of the law is also defeated when the Magistrate assumes what he imagines to be a judicial attitude and never looks at a paper or takes any interest in the case until it comes before him in Court, and proceeds to dispose of it with regard only to what is put before him by the parties, without any effort to do what more he can do to arrive at the truth A valuable check on police work and valuable powers in criminal administration are thus lost

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72 The Chief Justice of Madras writes of the officer with combined functions "His judicial duties are necessarily nothing more than an episode in his day's work, his habit of mind is necessarily the habit of mind of an executive officer, the atmosphere of his court is the atmosphere of the office of a man whose work is executive and administrative" On the other hand Mr Justice Benson, of the same court, writes "Under the present system the civilian though he has fiscal and executive duties, has also to discharge judicial duties from the beginning of his career, and is thus more likely to acquire a judicial habit of mind than if his work were wholly executive, and this habit of mind is of importance to the public, not only in the officer's discharge of his judicial work, but also in the disposal of his fiscal and executive duties, which, far more in India than in England, concern the daily interests and welfare of the people" I hold strongly that the executive habit of mind is as valuable to a judicial officer as the judicial habit of mind is to an executive officer, and that the best officer is he who combines both

73 The memorial itself affords me a striking illustration of what I mean In paragraph 2 a Regulation of 1793 is quoted from (applying to Bengal only) which deprived revenue officers of civil judicial powers because it was obviously improper that officers whose function it was to assess and collect the revenue should be empowered to adjudicate upon revenue questions Yet at the present day in Northern and Central India, the revenue officers, who form the executive agency of Government, are regarded, whether in the exercise of their executive or of their judicial powers, as the bulwark of the cultivator against the landlord and of the poor against the rich, and the whole tendency of recent years has been to enlarge their jurisdiction at the expense of that of the independent Civil Courts And the main reason for this being so is, that the Revenue Court has not divested itself of its executive traditions, that it sits, not merely to adjudicate, but to *inquire* into the truth of claims, that it is less bound by technicalities than the Civil Courts, and that it acts, as counsel for both parties The consequence is (in the Punjab, at any rate) that counsel are hardly ever employed in Revenue Courts, to the great advantage of the pockets of both parties, and with the result that real justice is far more effectively done

Till not very long ago transfers of officers between the executive and judicial were not infrequent, to the great advantage of both branches There are practical difficulties which are rapidly leading to the discontinuance of the practice, but it is agreed by all that a man makes a better Judge for having been a Collector, and a better Collector for having been a Judge

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74 But it is not merely the habit of mind and training of the District Magistrate that would be injuriously affected by the separation it would affect also his whole position in relation to the working of his district, and very greatly diminish his power of useful control I have briefly noticed the reasons against depriving the Magistrate and Collector of each of his present functions considered by itself But this is not the whole case, for the reasons, against their separation are still stronger, since it is their very combination in the same hands which it is so important to maintain As matters now stand, he is the impartial arbiter between all branches of the district administration, "the connecting link," to use the words of the Police Commission, "between the executive and the judicial functions of the administration" If he were deprived of either function, he would cease to exercise a moderating and beneficial influence upon both, and it is eminently inexpedient that his great power and influence should be thrown into either the one scale or the other If he were deprived of his magisterial functions and responsibilities, while retaining the control of the police, he would become a mere prosecuting officer, he would become *identified* with the police, instead of controlling them, and would inevitably bring to his police work (as Mr Justice Candy points out) "too much of the instincts and predilections of the policeman" On the other hand, if he were a mere Magistrate with no police powers, the police would lose that support which they at present derive from the fact that the District Magistrate is at their head, and which is so essential to their efficient working, for officer after officer speaks of the friction which not unfrequently exists between the police and the Magistracy, and of the undue tendency of some Magistrates to reject police evidence as such, to "assume a hostile attitude towards the police, to deny them a fair hearing, and to be diverted from the endeavour to ascertain the truth by a prejudice against them" In the one case we should have the Collector criticising the Courts, and attributing the criminal state of his district to their slackness, in the other he would lay it at the door of the District Superintendent of Police and his subordinates—a position which the Police Commission describe as "intolerably dangerous" (paragraph 121)

See the case powerfully stated by Sir A P MacDonnell, who goes so far as to apprehend that the Collector might end in being "overridden by his police" (paragraph 11 of United Provinces letter)

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Police Commission Report, paragraph 125

75 The division of power between a Judge with no interest in repressing crime and a Collector with no power to do so, would be fatal It is *unity* of responsibility and *unity* of control which is required and understood "in an oriental country where long tradition points to the concentration rather than the distribution of authority" (see paragraph 11 of the Madras letter, the whole of which is worth reading) As Mr Batty, now Judge of the Bombay High Court, says at page 52 of the Bombay papers, a merely judicial officer "has not open to him either the sources of information or the means of checking irregularities with promptitude which are at the command of the Magistrate of a District, and it is difficult to conceive how an official without executive control over all local departments could possess the opportunities and influence for good of which the chief revenue and magisterial authority can avail himself in preventing injustice in the preliminaries to judicial proceedings" Specific illustrations of the importance of unity of control and combination of powers are not absent from the papers To take Madras only, Mr Bradley gives, at pages 50 to 51 of the Madras papers, five instances, all within his own experience, in which the double powers were required Mr Nicholson, at page 48, gives an instance which I have known exactly paralleled among the masterful Jats of the Southern Punjab, except that the District Magistrate himself went to the spot and then and there flogged the ringleaders for theft Mr Le Fanu (pages 29-30) given an instance in which a serious failure of justice in a case of unusual importance was threatened because in Madras the District Magistrate has less power over his police than elsewhere, and averted by his control over his Subordinate Magistrate Mr Hare tells us of a part of the Rajshahi district which "was in complete anarchy, and no European dare show his face upon it" because some rioting cases had not been dealt with promptly (page 74, Bengal papers) But one need not go far for instances Every Magistrate who has ever had to see the Muharram through in a town in which the relations between Hindus and Muhammadans are strained, or who has had to keep order at one of the huge religious gatherings (*melas*) which are so common in India, knows well that he cannot afford to relinquish any portion of the powers which he possesses The fact is not without significance that during the gradual process by which, in province after province, the judicial duties of a District Officer have been lightened, it has always been his civil and never his criminal jurisdiction that has been transferred The necessity for his retaining the latter has always been taken as a matter of course The Government of Madras write, in paragraph 9 of their letter "Experience shows that, even in the most tranquil of Indian districts, there may be sudden outbreaks of disorder requiring prompt and vigorous magisterial action That the Judge should hasten from the Bench to take this action is obviously impossible, and is probably not intended by the memorialists Equally impossible is it that the suppression of a dangerous disturbance should await an order delivered *ex cathedra* by the Judge, and arrived at after the leisurely methods appropriate to ordinary judicial inquiries" In such cases what is wanted is prompt and vigorous action on the spot, and a strong man will take it, legally or illegally, and save his district from disorder It is our duty to take care that in doing what it is right and necessary that he should do, he shall have the support of the law

76 Again there is an inevitable tendency for such a separate service to set itself (unconsciously, perhaps) in opposition to the executive "Independence" is very apt to be so emphasised as to take the form of antagonism, especially among the superior class of educated natives The history of the old Calcutta Supreme Court affords a historical instance of this tendency (see page 16 of the Punjab papers), and the preamble to Bombay Regulation III of 1818, which made the Collector the District Magistrate also, recites that this was done "to prevent the collision of authorities, and to facilitate the administration of criminal and civil justice" Bengal furnishes the most striking illustration of this tendency, but it is by no means confined to that province I have seen it growing in the Punjab (where separation is of recent date, and is still less complete than in the older provinces) within my own experience A separate Judicial Service tends to regard itself as the protector of the people against the oppression of the executive, and is above all criticism, censure, or control, except that of a hierarchy of its own body The remarks of Sir John Woodburn in paragraphs 13 and 14 of the Bengal letter are forcible and weighty, and should be read, as they are too long to quote He writes "The abuse of judicial authority is infinitely more serious than the abuse of executive authority There are two constant tendencies in the English race to which a constant appeal is made in all this correspondence The one is the habitual check of the exercise of the executive power; the other is the habitual support of the exercise of the judicial power These are the natural tendencies of a self-governing community Abuse of executive power meets with instant rebuke and control, abuse of judicial authority is corrected haltingly and with hesitation The remedy of the one is prompt and sustained, the remedy of the other is slow and reluctant In a country which is not self-governed, the substitution of judicial authority for executive authority may readily lead, under the influence of these tendencies, to an entire paralysis of administration" In paragraph 16 of the same letter Sir J Woodburn writes "It is notorious that, even at present, the relations between the Judicial and the Executive authorities at the head-quarters station are often considerably strained in consequence of the disagreement of the authorities regarding official matters it is equally notorious that at most subdivisions the subdivisional officers and the munsiffs are scarcely on friendly or even on speaking terms, and that party-strife is thereby engendered, to the detriment of official work" He refers to the minute in

The "second case" quoted on page 50 of the United Provinces papers is an instance from another province.

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which Sir F Halliday (see page 132 of the Bengal papers) says the same And Mr Oldham, an old Bengal officer, gives his testimony to the same effect on page 114 of the same papers

76A Even apart from any feeling of official hostility, the divorce of the judicial machinery from all responsibility for the criminal administration is a fertile source of weakness in that administration A Judge, as such, has no interest in the maintenance of order or the repression of crime I have known a weak Sessions Judge almost paralyse the criminal administration of a district I have known a weak Chief Justice do infinite injury to the criminal administration of a province I have had myself, as District Magistrate, to appeal—quite irregularly, I believe—to the Chief Court to cancel an order of my Sessions Judge's, telling them plainly that unless they did so, I would not be responsible for the peace of my district Luckily, they did what I asked I would invite attention to a striking article in the *Pioneer* of 11th July 1902 which I put up below, and some of the figures from which I abstract as follows —

	1867	1880	1900
Punjab			
Total number of offences	49,000	103,000	180,000
Total number of murders	243	393	690
Percentage of increase in murders—			
(1) in frontier districts	..	..	33
(2) in other districts	...		113
Persons tried for robbery or dacoity	281	406	2,556
Percentage convicted of persons tried—			
(1) for murder	54	43	40
(2) for robbery or dacoity	60	51	40
(3) all classes of criminal trespass	55	49	24
(4) theft	62	75	44*
Percentage of sentences modified in appeal by Chief Court	1½	8	18½
Percentage of acquittals on appeal by Chief Court	4	16	19
Percentage acquittals in murder cases	4	7	14
Percentage of persons sentenced to death whose sentences were modified by the Chief Court	...	..	30
Percentage of acquittals on appeal by District Magistrates	20	27	24

* For 1899

I believe that the results which these figures indicate are due in part to the gradual separation of judicial from executive functions in the Punjab, and to the notorious and lamentable weakness of Sir Charles Roe, for many years the Senior Judge of the Chief Court, in criminal appeal cases The superior judicial appointments are becoming more and more frequently held by natives, and it is hopeless to expect from them any sympathy with the executive side of the administration Division of labour is good so long as co-operation is assured· but if it leads to antagonism it is destructive of all good government

77 And if such results follow when the separation extends only to the superior officers, the evil will be intensified a hundredfold if the separation is carried down to the lower grades It is so easy and so safe to acquit A reason can always be found (quite honestly) in the nature of Indian evidence, and it is so difficult not to accept the conclusion of the Magistrate who has seen and heard the witnesses There is practically no appeal from a discharge or an acquittal, while under the separate system, revision and appeal will afford the only opportunity for the exercise of control The superior Judge will safeguard the interests of the accused who appeals to him, but it is no concern of his that the guilty should not escape The temptation to a lazy, an indifferent, or a corrupt Native Magistrate to acquit when he ought to convict is great already· under the separate system it will be enormous Apart from acquittal, the inveterate tendency of Native Magistrates is towards inadequate sentences, and the tendency is one which can never be effectively checked by appellate Courts As Mr Rose of the

United Provinces Board of Revenue says "It is the feeble Magistrate, who shirks responsibility, and who will never convict or commit unless there is absolutely overwhelming evidence against the accused, whose decisions are least interfered with when they come before higher authority In subordination to the District Judge and freed from the control of the District Magistrate, he would be subject to no restraint, and would probably be congratulated upon the successful results displayed by his statistical returns" So, again, Sir John Woodburn writes (paragraph 6 of Bengal letter) "If the Subordinate Magistrates are allowed absolute freedom whether they will enforce the criminal law or not it is a matter of experience that they will not do so according to the standard which English experience demands for the administration of justice Even as matters stand it is the deliberate statement in the papers of one of the best and most cautious Magistrates in the province, that it is all but impossible to get a conviction in Bengal for a rich man for any offence whatever"

78 It must not be forgotten that an elaborate system of revision and appeal exists in India with which there is absolutely nothing to correspond in England For eight annas an appeal can be lodged against almost any order of a Magistrate, while the power of revision enjoyed by the higher Courts is unlimited and is freely invoked and exercised The control exercised by the High Courts is described by Sir Fitzjames Stephen in a passage quoted in paragraph 3 of the Bombay letter, where he says that they "have a power of general superintendence and inspection over the inferior courts which is possessed by no authority in England over any court whatever" In addition to all this, the Indian law provides special safeguards against the occurrence of such abuses as the memorialists allege which have been added to and strengthened at successive revisions of the Criminal Procedure Code Under such a system that *subordination* of the executive powers to judicial control which is essential to our system, need not involve the *separation* of the two functions

See paragraph 17 of Mr Hewett's note
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79 But, apart from the administrative danger, there is a still more serious political danger I would invite special attention to an admirable minute by Sir Alfred Lyall which will be found at page 157 of Proceedings Nos 188—223, October 1888 He writes as follows —

"The control which the Courts can exercise over the ordinary proceedings of executive officers is very stringent They can determine absolutely the line of demarcation between executive and judicial provinces, they can sit in judgment over every official act, they can not only declare it perverse, erroneous, or void, but they can heavily punish any officer who may transgress the limits they may have laid down It is true that public servants of a certain class, when accused as such of offences, cannot be prosecuted criminally without previous sanction of the Government, but this barrier is a weak one, easily forced by a strong *prima facie* charge, and an officer is liable under the civil law to any extent

"In England this principle of the universal subjection of all officials to the ordinary law has always been the most admirable safeguard of the public liberties But England is a compact nationality with representative institutions, and with a Legislature whose laws can not, I believe, be questioned by the Courts, and in England itself there are no fundamental differences of race or politics that might affect the relations between the judicial and the executive authorities Whether the system would continue to succeed in Ireland, if the Judges were mainly Irish, has not yet been seen But no other European Government has ventured to submit all its acts and orders to the jurisdiction of the ordinary courts"

He points out that hitherto our system has worked fairly well for two reasons, firstly, because all the superior judicial offices have been in English hands, and secondly, because "the judicial and executive offices have been freely interchangeable within a close Civil Service" At the present moment neither of these conditions exists The proportion of the higher judicial offices which is held by natives is already considerable and tends constantly to increase, since natives (under proper control) are better suited for judicial than for executive duties The Subordinate Magistracy is, of course, almost wholly manned by natives The separation of judicial from executive office has already made considerable progress, and it is now proposed to make it complete Sir Alfred Lyall points out that the separation "will of itself strengthen the *esprit de corps* and identity of sentiment among Judges of every degree, it trains them upon one line, and where, as in India, a strong bureaucratic Government and an equally powerful judicial body stand as it might be said, facing each other, the tendency of the two separate services will be more or less to draw off into opposite camps' This is true, even where both camps are filled by English officers If natives should become decidedly predominant in the judicial branch (Sir Alfred Lyall continues), "I think they will some day become more powerful as Judges, and less under control than as revenue officers, and in miscellaneous executive appointments, more likely to be influenced by any popular or political movement, and more prone to take up, in regard to the executive authority, an attitude that may under certain circumstances be highly inconvenient"

80 There will be unjust Judges as well as unjust executive officers, and as often, for both classes are human, there is a judicial bias, as well as an executive bias, which is by no means unknown in India And the danger of an abuse of judicial power is far greater than the danger of an abuse of executive power, for it is infinitely more difficult either to control or to remedy the former than the latter In times of peace we can carry on after a fashion under almost any system But some day we may be put to the test, when our armies are engaged in the defence of our frontier, and we need all the strength that we can get in our internal administration At such a time, strong District Officers will be worth to us many battalions

81 Sir John Strachey, one of the most capable of Indian administrators, writes (India, page 287, 2nd edition) —

"We often hear demands for the more complete separation of executive and judicial functions in India, but they are demands based on the assumption that because this is good for England it is good for India also There could be no greater error The first necessity of good administration in India is that it should be strong and it cannot be strong without the concentration of authority In the every day internal administration there is no office so important as that of the Magistrate and Collector He is one of the mainstays of our dominion, and few steps could be taken in India which would be more mischievous and dangerous than to deprive him of those powers which alone enable him to maintain his position as the local representative of Government"

82 Let us turn to the opposition Mr Ranade was a Native Judge of the Bombay High Court, a leader of the Congress party, and a Mahratta Brahmin, closely connected with the Poona set, who was at one time, I believe suspected of active disloyalty He was a strong advocate of partial separation Yet at pages 32-33 of the Bombay papers he writes as follows —

"The District Magistrate discharges the useful function of acting as the common link between the Government and the people He represents the wants and needs of his district and in many cases he takes a pride in his work He acts as an adviser and examplar to the young Magistrates and controls the Police and the different departmental agencies He superintends the work of education, medical relief, vaccination, prisons, the Local, Municipal and other bodies, irrigation, public works, sanitation, survey and settlement, and a thousand other functions associated with Government The Subordinate Magistracy has not to discharge these duties, at least to the same extent In the case, therefore, of the District Magistrate there are good reasons to think that not only the abuse of power is less to be apprehended but also the advantage of his combining all the functions of Government are decidedly so great as to outweigh the chance of abuse of his power"

83 The fact is that, to the masses many of whom die without ever having seen a soldier, our Collectors of district *are* the Government Sir Antony MacDonell, writes as follows (paragraph 16 of the United Provinces letter) —

"For the present the success of all these measures, and the very existence of stable Government, depend on the maintenance of a strong executive authority, and public opinion, as well as the conditions of things at present, demand that this strong executive authority shall not be divorced from judicial power This authority is required as much for the purpose of correcting the shortcomings of the untrustworthy subordinate agencies we are, through want of better, compelled to employ, as to suppress overt crime The existence of such an authority is essential to the idea of government at present universally prevalent in these provinces, and its removal would be misunderstood and might lead to chaos The Lieutenant-Governor looks equally with the distinguished gentlemen who have memorialised the Secretary of State, to the time when the judicial may be safely separated from the executive power in India, but, in his responsible opinion, that time has not yet come in the North-Western Provinces and Oudh."

It certainly has not come in Bengal

84 Finally, there is the financial objection As I said three years ago, I think it is of the utmost importance to remove our decision against the separation (if that is the decision at which we arrive) from the narrow basis of financial impracticability upon which it has been placed by two different Secretaries of State, and to rest it upon the broader basis of administrative and political inexpediency So long as it rests upon the former, we shall periodically be called upon to examine suggestions (such as Mr Dutt's scheme) for overcoming the difficulty, and shall always be liable to pressure on the ground that our financial position has or might be improved Already we are told by a grateful Press that, instead of reducing the salt tax, we should have spent our surplus in improving the position of the educated classes And that would be one of the most obvious results of the proposed separation

Page 11 of notes in Judicial Proceedings, March 1900, Nos 295—98

85 At the same time, the financial aspect of the question cannot be disregarded We govern India "on the cheap," and we must accept the resulting imperfections *Primâ facie* any separation must involve additional expenditure Our Indian establishments are all short-handed, and to employ them to the best advantage some one person must be free to distribute the whole body of work according to the needs of the moment But the memorialists have presented us with a scheme elaborated by Mr Dutt, which is to effect their objects without involving any additional expenditure Mr Dutt's proposals were condemned by Sir A P MacDonnell in 1893, but chiefly on administrative grounds He wrote —

'Mr Dutt's scheme will not, however, stand examination, and it fails especially when he tries to deal with sub-divisions His proposals on this head would really involve the destruction of the sub-divisional system This system now constitutes the framework of the administration in Bengal, and the Lieutenant-Governor, who has had experience of provinces where there are no subdivisions, or mere attempts in that direction, would strongly oppose any reconstruction which would weaken or impair them in any degree"

The scheme has now been examined by the Bengal Government in its financial aspect also (paragraphs 15 to 17 of their letter), and the results are summarised in paragraph 16 of Mr Hewett's note It involves an initial expenditure of 4 and a recurring annual expenditure of 15 lakhs Other local Governments have shown how absolutely impossible it would be to adopt it in their provinces on administrative as well as on financial grounds One obvious and very serious objection to it is that it doubles the area of all jurisdictions The distances which the people have to travel in order to attend upon officers and Courts are already very great, and constitute one of the causes which render them unwilling to assist us in the prosecution of offenders, every increase in the size of a charge diminishes that most important element of efficiency—local knowledge; one of the weakest points in our administration is that our charges are already too large, and any proposal that tends to increase their size stands condemned from the administrative point of view

Complete separation which did not involve this result would mean in most cases doubling the existing staff Even if this were financially possible, I agree with Madras that "the increased expenditure would be more wisely applied in reducing the excessive size of the division placed in charge of a single officer, rather than in doubling* the size of the division, and depriving half the officers of their magisterial powers"

* Or rather, retaining undiminished

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(paragraph 9, Madras letter)

V —*Conclusions*

86 In addressing Secretary of State I would first explain the delay Our desire to have the opinion of the Police Commission would account for part of it We might then briefly refer to the consideration and inquiry to which the question has been subjected on previous occasions by Government of India, as set forth in paragraphs 3 to 7 of Mr Luson's note of 6th September 1899, and especially to the inquiry of 1884 Then I would examine the memorial on the general lines of paragraphs 38 to 40 above We might then remark somewhat as in the two opening paragraphs of His Excellency's note of 31st January 1900, and say that, although Government of India have on various occasions considered the question of separation, yet they have not, at any rate of recent years, officially consulted Local Governments about it, and that we are glad to have had this opportunity of subjecting it to an examination so complete, of giving an opinion upon it so mature, and of supporting that opinion in such a manner as may, we hope, set the question at rest, at any rate for some time to come We would then proceed to examine the general question and to state our conclusions upon it on lines which will emerge from our discussion of these papers And I should be inclined to add as an appendix to the despatch, the substance of paragraphs 4, 5, 6, 8 and 9 of Mr Hewett's note in this file, supplementing paragraph 9 from the English notes contributed by Sir A Fraser

87 In dealing with the case I would omit (as I have omitted in this note) all reference to the Judicial functions of the Revenue Officer as such They hardly exist in Bengal, for reasons which appear in paragraph 2 of the memorial, and the memorialists neglect both the revenue and the civil aspect of judicial functions, and concentrate their attention upon the criminal side The separation of revenue powers finds no place in Mr Dutt's scheme, which the memorialists support, and none of Mr Mano-Mohan Ghose's instances of abuse bear upon it There is an incidental reference to revenue functions in the 4th line of paragraph 1, in the 5th line of paragraph 3, and in the quotation from Sir W Hunter in paragraph 11 of the memorial So far as the Bengal interest is concerned with the revenue question, it is concerned with it in the form in which it is stated as sub-head (vi) of paragraph 12—"appeals from revenue assessments are apt to be futile when they are heard by revenue officers" But the appeals in question are executive and not judicial appeals, so that the question here raised has absolutely no bearing upon or connection with the combination of executive and judicial functions The question here raised is quite a different one—namely, whether the assessment of land revenue should or should not be subject to the control of the Courts of Law. That is a distinct question which is being brought forward just now with ever-increasing persistence, and with which we shall doubtless have to deal presently But in this case it is a pure red herring, and we may decline to be diverted from the true scent As Sir A P Mac Donnell says, "a proposal which would certainly, if carried into effect, alter radically the character of British rule, and might touch the solvency of the British Government in India, ought not to have been so lightly raised" (paragraph 3 of United Provinces letter) I have stated my view of the value of the Revenue Courts in paragraph 73 of this note

88 In the second clause of paragraph 22 of his note Mr Hewett comments unfavourably upon the present arrangements for adjudication upon the status of land (as State or non-State) in Upper Burma If the law is really interpreted as described in paragraph 11 of Mr Adamson's opinion (page 19 of Burma papers) I have not a word to say for it, and it might be altered so as to put an end to the absurd state of affairs depicted by him But the case as between the Government and the claimant to hold his land as non-State is a separate matter Without a close study of the history of the existing provisions of the regulation, and of the question generally, it would be impossible to deal conclusively with it But my views, so far as they have formed themselves, are briefly as follows Under the Regulation, the material differences between State and non-State land are two (1) that in the latter no heritable or transferable right can be acquired, so that the occupant is so far as the law goes, a life-tenant, and (2) that the former pays rent and the latter revenues This latter distinction, when acted upon at all, takes the form of lower rates (generally by 25 per cent.) being assessed upon non-State them upon State land. But in the later settlements there has been a tendency to make no distinction, but to assess both sorts of land at rates which are moderate revenue rates for non-State land

89 The first of these two differences I have always regarded (speaking, as I say, from mere impressions) as mistaken I do not see why at least a heritable right should not be given to the occupant of State land in Upper as much as in Lower Burma, and I have little doubt that the law will be altered in this direction before very long.

90 As for the second distinction, what a man claims when he claims that his land should be classed as non-State, is that it should be assessable at privileged rates But that is a claim which has always been excluded from the jurisdiction of the Civil Courts, and left to the final adjudication of Revenue officers in their executive capacity, though in some prov-

inces, owing to the number and complexity of the claims, special commissioners have been appointed for the purpose

91 Some years ago, when I was Secretary in the Revenue and Agricultural Department, we pressed strongly upon the Burma Government the importance of getting the claims to non-State status disposed of speedily throughout the province, and as a fact, I believe that most of the districts in which there is a real distinction between State and non-State lands have already been settled, and the status determined In any case the question is a complicated and difficult one, with which it is impossible to deal in connection with the present case, and which indeed, it would hardly be fair to ask Sir Hugh Barnes to take up until he has learned more about the province

92 It will appear from what I have written above that I am an uncompromising opponent of the separation of executive and judicial functions I regard it not only as inexpedient, but as absolutely incompatible with efficient administration in India I would not yield an inch in the matter of principle But in the matter of practice, and especially so far as the District Magistrate is concerned, I would yield a good deal on grounds of practical administrative necessity In his Minute which I have already quoted in paragraph 67 Sir James Stephen wrote — "It will not of course be supposed that I mean to throw doubt on the utility of dividing, as far as possible, judicial and executive magisterial duties between different Magistrates The division between the Magistrates themselves of judicial and executive *duties* is one thing, the union of these *powers* in Magistrates as a class is quite another" The Collector of a District is grievously overweighted, and already he is the best Collector who best knows which part of his work to neglect, and when to neglect it, for it is impossible for him to do it all at once When executive and judicial duties come into conflict, it is the former that go to the wall, for the District Officer feels that it is impossible to keep even the parties to an appeal, and still less 20 or 30 witnesses who have come 40 miles to his Court, waiting while he disposes of papers

93 Thus however desirable it may be from some points of view that the Collector should take a substantial share of the magisterial work of his district, yet since that work can be done by others, while much of the executive work must be done by him, it becomes, at any rate in those provinces in which the administration has reached its full development of complexity, of the utmost importance to relieve Collectors of judicial work as far as possible Mr Hewett shows how much has already been done in that direction, and I believe I am right in saying that even since he wrote his note, the process of relief has advanced a stage in Assam, Burma, and the Central Provinces How far it will be possible to go at once in any given province will be a matter for consideration in consultation with Local Governments But I would suggest the following as the ideal to be arrived at I would relieve Commissioners of all judicial functions except on the revenue side I would relieve all executive officers of civil judicial powers I would relieve Deputy Commissioners of "section 30" cases, though I would not deprive them of powers under that section, where they already possess them, for reasons indicated at the end of paragraph 50 above While leaving to them both their original and appellate powers, I would direct them to confine their exercise to the class of cases discussed in paragraph 48 I would relieve Tahsildars of the greater portion of their criminal work, though they should retain their powers, and occasionally exercise them to show that they are there I would consider, in consultation with Local Governments, the possibility of amending sections 191 and 556 of the Criminal Procedure Code as suggested by Messrs Chatterji and Ghose (paragraph 50 above) I would forbid the practice discussed in paragraph 54 of this note.

94 All this will mean the strengthening of the judicial staff, and will therefore cost money But the money will be well spent if it results (as it will result) in the increase of executive efficiency

95 The memorialists apparently demand an immediate separation of executive from judicial functions throughout the whole of India But many of the strongest advocates of separation recognise that in "the more backward parts" of the country such a separation would be inadvisable, and would exempt such parts from the sheme Others would go still further, and would confine the separation to parts of the country which are sufficiently "advanced" For instance, Ameer Ali, J (Calcutta), writes —

"I do not for a moment advocate the separation of the two functions throughout India, utterly regardless of the local conditions and necessities In my opinion there are many districts where a continuance of the old system is needed But I do not see why the separation should not be effected in the advanced districts of Bengal, and in other parts of India, similarly situated," and Mr Dutt and Sir H. Cotton use similar language

Now the mere admission that there are backward parts of the country which are not yet ripe for separation involves the further admission that separation will weaken the administration As Madras points out in paragraph 11 of its letter, "the practical question to be considered is this, whether, looking to the actual conditions of the country, the time has come when the maintenance of a strong executive is no longer essential, and when the preservation of order and the stability of the Government may be safely entrusted to the instinctive good sense of the people themselves The experience of this Government answers this question with a decided negative The *Pax Britannica* is not, as the memorialists appear to hold, self-existent, but is maintained largely by the unremitting exertions of the handful of Europeans whom it is now proposed to deprive of their magisterial powers Even in this presidency, which has been longest under British rule and is one of the most orderly and peaceable in

India, subterranean explosive forces from time to time produce sudden and startling events" And it proceeds, in this and the following paragraphs to give concrete instances of what it means

95-A Now what is meant by "advanced"? There are of course parts of India where the higher education is better provided for, the educated classes more numerous, and the spirit of independence which animates them stronger than in other parts But it is not the educated classes with which the criminal administration is chiefly concerned, it is the masses of the people which form the material which we have to govern, and they are very much where they were when we first began to govern them Setting aside tracts inhabited by jungle folk and aboriginal tribes (who are, I may remark, as a general rule among the most peaceful and orderly of our subjects), the masses of the people are very much on the same dead level throughout the whole of India, so far as "advancement" or enlightenment is concerned If any part of India could be regarded as more advanced than another, one would imagine it to be the Presidency Division of Bengal, which surrounds and includes the Bengali capital Yet the Bengal Government tells us that "in the statistics of offences against the public tranquillity—the class of crime in which the landholders principally come into notice—the Presidency Division bears regrettable pre-eminence" (paragraph 10 of Bengal letter) And Mr Monro, speaking with unrivalled knowledge of the facts, shows in an interesting examination of the question (pages 47, 48, Bengal papers) that "these so called enlightened districts furnish nearly one-sixth of the criminal cases in Bengal, and that as in 1882, so in 1898, the District of the 24-Parganahs, after 16 years of education, and a long term of Congress elevating influence, still returns far and away the largest number of criminal cases in Bengal" So again Mr Oldham describes the southern portions of "the great District of the 24-Pargannahs in which Calcutta stands" as "the most lawless tract in Bengal, in which authority can only be asserted by armed force, which too is frequently and openly resisted" (Bengal papers, page 108)

See, for instance, Mr Oldham's graphic description of the state of affairs in Bengal in paragraph 6 of his opinion at page 109 of the Bengal papers

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Indeed, I believe that in some respects Bengal as a whole is the most criminal province in India In no other province, to the best of my knowledge, do the landowners habitually hire or even retain armed force for the settlement of civil disputes In no other province does that most dastardly of all crimes exist, in which a gang of hired ruffians ravish a respectable woman, not from lust, but in order to disgrace her family In no district off the frontier are murders so common as they are in certain districts of Bengal On page 125 of the Bengal papers Mr Marindin gives a graphic picture of the state of crime in Bengal I agree with Sir Lewis Tupper (page 2, Punjab papers) that one of our weaknesses, even perhaps of our dangers, is the assumption that the changes which are superficially remarkable have really gone very deep

96 It has been suggested that we might try the experiment of separation in one or two selected districts of Bengal (including of course Darbhanga), and let the results form an effective answer to its advocates But I do not think that we should be justified in taking action of the unwisdom of which we are convinced, merely with a view to show that it is unwise In the first place, the results of the experiment, however convincing to ourselves, would very probably fail to convince the opposite party, for it would be difficult to exhibit them in a form which could not be disputed In the second place if we agreed to an experiment in the matter of separation, it would be difficult to refuse to try similar experiments in such matters as the suspension of the Arms Act, universal trial by jury, and other similar demands of the Congress party And in the third place (and this is, I think, the strongest objection of all) we should be sacrificing the best interests of the people in the districts in question, to the fads of a school which has little either of knowledge of or of sympathy with them I should dearly like to make over Bengal to the Bengalis for a few years, to govern after their own fashion But I think that considerations similar in nature, though of course widely differing in degree, forbid both the large and the small experiment

97 The Punjab Government, in paragraph 13 of its letter, shows why a strong administration is as necessary as ever I agree with that Government that "the time is one for strengthening, not weakening, the executive" The schoolmaster (and what is more, the pleader) is abroad The respect for authority as such, which is on the whole traditional with the Indian people, is yearly diminishing, the English ideas of liberty and independence are yearly spreading more widely among a people whom we do not propose to allow to be free or independent, the habit of obedience which alone enables a handful of Englishmen to control the millions of India is weakening, the disposition to question orders instead of obeying them is strengthening, fostered by the principles which we ourselves and our English education instil into the minds of the people The spirit which prompts the present demand for separation is the very spirit which, as soon as it reaches the masses, will render a strong administration more than ever a necessity; and the "advanced" districts, in which that spirit is strongest, are precisely those in which that spirit is most likely to reach the masses, and to do so soonest

98 I fear that some of the views which I have expressed, especially in the earlier paragraphs of this note, are such as would shock the legal conscience of a strenuous supporter of the English judicial system in its integrity I can imagine that, in the judgment of such a one, the fact that I held them might deprive my opinion in this matter of such weight as it would otherwise possess I can even imagine that, taking them as typical of the views generally

held by Indian officials who exercise combined executive and judicial functions, he might find in them his strongest argument for immediate separation I can only say that I have recorded them with a full sense of responsibility, that they are based upon a long and somewhat varied experience of India, including several years as the District Magistrate of one of the most criminal districts in the Punjab, where, under a succession of weak District Officers, crime had become rampant, and in which I succeeded in reducing it to moderate dimensions, and that I believe that I may fairly claim some knowledge of the common people, who really matter most to us, and of their views and feelings, and a very genuine sympathy with and liking for them. It is not always expedient to say all that one thinks, and in framing a despatch which will certainly be published, it would doubtless be wise to put some of my views—supposing that they commend themselves to my colleagues—somewhat less bluntly than I have put them But in writing this note I have not hesitated to express my opinions plainly.

DENZIL I[BBETSON],—1-8-03

P S—Since writing the above, I have discovered certain memorials in favour of separation, which are not mentioned in the notes They are from—

(1) The Murshidabad Association, } identical,
(2) Inhabitants of Murshidabad, }
(3) The Purulia Pleaders' Association,
(4) The Hughly Bar Association;
(5) The Khulna District Court Pleaders' Association,
(6) The Orissa Association,
(7) The British Indian Association (Kunwar Kumar Tagore),
(8) The Indian Association (Surendra Nath Banerjee)

I do not wish to comment upon them But it is right that attention should be directed to their existence.

DENZIL I[BBETSON],—3-8-03.

Statement showing the names of High and Chief Court Judges and the length of their services otherwise than at head-quarters.

Names of Judges of High and Chief Courts.		Length of service otherwise than at head quarters	
		Judicial	Executive
	For total separation	Y M.	Y M
Calcutta	Maclean,* C J	...	...
	Sale,* J	...	...
	Bannerjee,† J	...	...
	Amir Ali,* J	...	...
	Hill, J (a)	...	
	Stanley,* J	...	
	Ghose,† J	...	...
	Stevens, J	10 0	11 10
	Rampini, J	10 10	10 0
Bombay	Tayabji,* J	...	...
Madras	Arnold White, (b) C J.	...	...
	Shephard, J (c)	...	...
	Davies, J	7 6	9 11
	Boddam,* J	...	...
United Provinces	Henderson,* J.	...	...
Punjab	Chatterji,† J		...
	Total Service	28 4	31 9
	For partial separation.		
Bombay	Jenkins,* C. J.	...	...
	Ranade, J.	20 4	...
	Fulton, J.	5 9	5 10
	Candy, J.	6 4	13 1
Punjab	Maude, J.	3 10	7 1
	Total Service	36 3	26 0

* Barrister Judg
They had no service p
vious to their appoi
ments to the Hi
Court

† Pleader Judg
They had no service p
vious to their appoi
ments to the Hi
Court.

(a) Barrister Judg
Previous to his appoi
ment to the High Cou
he was Public Prosecut
to the Government of t
United Provinces

(b) Barrister Judg
He was Advocate Ge
eral, Madras, previous
his appointment as Ch
Justice.

(c) Barrister Judg
Previous to his appoi
ment to the High Cou
he held the appointme
of Professor of La
Government Pleader a
Advocate General, r
pectively

Statement showing the names of High and Chief Court Judges and the length of their services otherwise than at head-quarters—contd.

Names of Judges of High and Chief Courts			Length of service otherwise than at head-quarters			
			Judicial		Executive	
			Y	M	Y	M
		Against separation.				
Calcutta	Prinsep, J		6	11	5	5
	Bret, J		7	10	8	10
	Prat, J		11	11	11	11
Bombay	Crow, J		16	4	4	4
Madras	Benson, J		5	6	11	1
	Moore, J		10	9	13	0
United Provinces	Stratchey, (d) C J					
	Knox, J		4	9	9	5
	Aikman, J		7	4	13	10
	Burkitt, J		2	5	21	9
Punjab	Clark, C J		4	6	13	0
	Harris, J		8	4	7	10
Burma	Copleston, C J				19	7
	Birks, J		..		20	1
	Thirkell White (Judicial Commissioner, now Judge)		..		6	6
		Total Service	86	7	166	7
		Doubtful				
Calcutta	Harrington,* J					
Bombay	Russell,* J					
Burma	Fox, (e) J		..			
	Bigge, (f) J		12	5		
Punjab	Robertson, J		1	11	10	8
		Total Service	14	4	10	8
		Grand Total of Services	165	6	235	0

(d) Barrister Judge Previous to his appointment to the High Court, he was Law Reporter and Officiating Public Prosecutor

(e) Barrister Judge Previous to his appointment to the Chief Court, he was Government Advocate, Rangoon

(f) Barrister Judge

Confidential.

Sir Thomas Raleigh has sent me the accompanying note upon the case of the separation of judicial and executive functions He had made great progress with a note on the subject before he left India, and I urged him to finish it and let us have it, as his present views show the effect of five years' experience of Indian conditions upon the very different views which he held at first

He very properly stipulated that, before making use of the note, I must obtain the permission of His Excellency, and the consent of the Hon'ble Mr Richards, and these have been readily accorded

Sir Thomas tells me that the short note which I have headed Appendix B is intended for me personally He writes "it is a literary note, which may or may not interest you, but would probably bore Council" I have ventured to append it to the main note, as it seems to me an interesting contribution to the discussion

My recollection is, that, by His Excellency's orders, a copy of the notes in the case has been sent to each Honourable Member If so, these should be similarly sent in continuation

DENZIL I[BBETSON],—21-2-05

Note by Sir Thomas Raleigh on the proposal to separate Judicial and Executive Functions

When my honourable friend Sir Denzil Ibbetson was in London, he asked me to write a note on this important question I do so with some hesitation, for my successor, not I, has the right to advise in these matters But if my honourable friend Mr Richards does not object, and if His Excellency cares to have my opinion, I will give it for what it is worth

2 We seem to be agreed in accepting the abstract principle of separation Put in a practical form, the doctrine amounts to this, that our judicial officers should be specially trained for their duties, and that, in performing those duties, they should not be subject to any form of executive pressure To this end it is no doubt necessary that there should be a certain separation of services How far the separation can be and ought to be carried is a question of methods and resources

3 Both the judiciary and the executive are concerned in the administration of justice, and it is necessary at the outset to state clearly what are judicial and what are executive functions "Judicial functions" if we are to use the phrase accurately, may be briefly described The office of a judge is to hear evidence and arguments properly brought before him, to apply the law to the matter in hand, and to give a judgment based on the facts and the law He may not travel out of the record, nor is he allowed to import his own opinion of any person or matter into the discussion In like manner, an appellate tribunal can look only at the record of evidence taken and judgment given in the Court below.

4 In relation to courts of justice, the phrase "executive functions" includes the appointment and promotion of judges, the provision of court buildings and staff, and of such force as is required to secure obedience to decrees and orders Inspection and control, which occupy so important a place in our Indian system, are also executive duties, though they may be, and often are performed by a judge When, for example, we are asked to place all the subordinate magistrates in a district under the control of the sessions judge, the proposal involves a large addition to the executive duties which the sessions judge is to combine with his judicial work

5 So far as civil justice is concerned, we have already effected a separation as complete as the nature of things will permit As for the revenue Courts, I hardly think it necessary to mention them in addressing the Secretary of State They are so essential to our system of administration that no practical person would even consider the question of disestablishing them Again, I do not see that any practical question arises in regard to the preventive powers of the District Magistrate These powers are given by law to the executive, and no judicial officer possesses the kind of knowledge which would enable him to exercise them promptly and wisely The one outstanding question for consideration relates to the trial of criminal cases Can we make and ought we to make an arrangement by which all such cases shall be brought before merely judicial officers? Can we withdraw, and is it safe to withdraw the criminal powers now exercised by District Magistrates and their executive subordinates?

6 That we *can* take this important step is shown, I think, in the scheme put forward by Mr Dutt The scheme may be wise or unwise, but it is at least intelligible, and I am not disposed to reject it merely on the ground of expense We have recognised the necessity of additional expenditure on education and police, if we are to do our duty to the people, justice may have to be added to the list

7 At the same time, I think the Government of India would be ill-advised if they were to accept any symmetrical plan of separation and undertake to carry it out The tendency of all such plans is to withdraw the influence and control of the Executive, to assert the complete independence of the subordinate judiciary, and for this I think India is not yet ripe It is admitted by Sir H Cotton and others that one incidental effect of the scheme would be to increase the proportion of natives of India employed in judicial work I have no desire to

disparage native judges and magistrates In point of technical knowledge they often have the advantage of their European colleagues, and their standard of honesty is now almost everywhere high Their faults are timidity and procrastination, and these faults are corrected, not so much by the dilatory system of appeals as by the influence of the Head of the District The Chapra case shows how that influence is abused, when the District Magistrate goes beyond his duty, but I do not think we can dispense with the advice and stimulus which some native magistrates require

8 I think there are grave objections to the proposal to deprive District Magistrates and Tahsildars of their criminal powers My own observation convinces me that the possession of such powers is an element in their authority, and an element which, under present conditions, we cannot afford to lose It may be that both District Magistrates and Tahsildars need to be reminded of the limits within which their powers must be exercised Where an executive officer has to take action against an individual, he ought not unless in case of necessity to try that individual on a criminal charge

9 There are indeed partial and local experiments in separation which may with advantage be tried I may refer, for example, to the "stationary magistrates" of Madras, as to whom we have some curiously conflicting evidence Mr Horsfall, a judge of great experience, thinks they have been an unqualified success, the executive authorities evidently think otherwise I asked Sir Arundel Arundel about this, and gathered from him that the real objections to stationary magistrates, are (1) that the tahsildar, if he is forbidden to try criminal cases, becomes a "water-snake," and the people cease to respect him, and (2) that the stationary native officer, doing only judicial work, "gives himself the airs of a little High Court" and takes a truly judicial pleasure in giving decisions which embarassed the executive These objections ought of course to be considered, but I should expect to find that an officer doing only legal work would at least be a better criminal lawyer than the executive officer who combines his law with multifarious information about crops, water-supply, and stamps

10 I have spoken of District Magistrates and tahsildars together, but I should like to add some remarks on the proposal under discussion as it affects the Indian Civil Service On the efficiency of that service our whole interests depend, and the mere fact that all civilians (with few exceptions, and those easily accounted for) are opposed to separation would almost decide me against it Considering how much ability is drafted into that service, and having regard to the importance of a good understanding between the judiciary and the executive, I think it is good for India that civilians should be employed in both kinds of work But the system can only be defended if the service are able to show that they furnish a good judiciary—as good as we could obtain by any feasible scheme of selection and special training And if this demand is to be met, there are certain points at which the existing system may perhaps be strengthened

11 My first suggestion is, that the practice of employing young men to try cases almost as soon as they come to India, may be reconsidered Every province has its tales of the decisions of young assistants, but what is partly a joke to us may be a serious matter for those who are tried by "boy judges" There is an implied fallacy in the use of the phrase "petty cases" No case is really unimportant which involves taking a man from his family and sending him to prison It would surely be safer to keep a young man in the executive line, where he can be guided and controlled, and his mistakes can be set right without the solemnity of an appeal If judicial powers were given as the reward of proved knowledge and capacity, judicial work would be more highly valued

12 My second suggestion is that civilians who wish to qualify for judicial service should be encouraged and enabled to obtain some legal training, and to pursue their studies in India or at home A young friend of mine who went to India not long ago, discovered a point of law in the case he was trying, and went to consult the District and Sessions Judge The Judge smiled at his enthusiasm, and explained that he himself knew nothing of the matter, that no civilian was supposed to know any law, that the pleaders would tell him of any authorities he ought to look at, and so forth I should like to send gentlemen of this way of thinking a circular somewhat on the model of Lord Kitchener's General Order on the training of military officers If young men aspire to be judges surely they should be encouraged to read, and to make use of their leave by improving their knowledge at home

13 My third suggestion is that the practice of placing men on the judicial side because they are not good at executive work may also be re-considered The practice exists indeed several Lieutenant-Governors have given me arguments in support of it One high authority told me that in revenue work, a man should have tact and discretion; but a judge, he said, has only to sit on the Bench and look up the appropriate section in the Code. Mr Pinnell has certainly done something to break down this serene optimism An indiscreet judge works great mischief, his mistakes are made in public, and the "independence of the Bench" is invoked as soon as his superiors offer to touch him

Sir Denzil Ibbetson disclaimed the argument stated above, but he put the case to me in this way "It is important," he said, "to get good judges, it is still more important to get good executive officers" That may be, but I deprecate appointments which lower the credit of the judicial branch

What I really should like to see is a change of sentiment about the courts of a province As things are now, if one were to tell a Lieutenant-Governor that his settlement officers are incompetent, he would regard the statement as a grave accusation against himself. But if one tells

him that his courts of justice are unsatisfactory, he readily agrees, and does not seem to mind very much

14 There is a further suggestion, embodied in a minute on the administration of justice recorded by Sir J F Stephen in 1872, that a certain number of District and Sessions Judges should be appointed from the Bar I only suggest enquiry as to this, for the proposal presents some obvious difficulties It affects promotion, and could only be adopted with careful regard to subsisting interests Again, if judges are taken from the ranks of the Vakeels, the Indian element in the judiciary may gain at the expense of the European If on the other hand English Barristers are taken, there may be no steady supply of men to reckon upon, for the English Lawyer gives himself by preference to commercial business, and is often ignorant of Indian languages and customs But there are Englishmen with mofussil practice to whom the pay of a District Judge would be an attraction, and if the service were leavened with such men they would raise the standard of professional knowledge

15 I have perhaps ventured rather far afield in giving my views on the general question I now proceed to deal with the case as presented in the papers now before Government

The correspondence opens with a despatch from the Secretary of State, dated 3rd August 1889, giving cover to a memorial signed by ten gentlemen, seven of whom have held high judicial office Government must of course attach great importance to the considered opinions of these authorities, but a close examination of the memorial and accompanying papers makes it evident that they have appended their names to a document with which they are not in complete agreement The memorial itself is composed without due regard to accuracy and fairness, on this point it is enough to refer to the passage taken from the Despatch of the Court of Directors dated 24th December 1856, as set out in Mr Luson's note of 6th September 1899 The memorial cites with approval the Congress Resolution of 1893 which describes the present union of judicial and executive functions as "fraught with incalculable oppression to all classes of the community," and in paragraph 13 it is submitted that "nothing short of complete separation can remove the danger" It is interesting to compare these strong expressions with the caution observed by some at least of the memorialists when they are writing on their own account Sir Richard Garth has used language as sweeping as any to be found in the memorial, but in this respect he stands alone Lord Hobhouse, after pronouncing generally in favour of separation, goes on to remark that "it is a very long way to descend to particulars and to say that the circumstances of the day not only demand, but render possible a further extension of independent judiciary" Sir Richard Couch testifies that in his time the executive were in the habit of loyally accepting the decisions of legal tribunals On Mr Monomohun Ghose's assertion that within the last twenty years there has been a change for the worse, Sir Richard Couch is "unable to believe with Sir Richard Garth that the Government of India approves it and would be sorry to see it altered" Sir John Scott, whose opinion on any question of judicial organisation is entitled to high respect, was one of those who signed the memorial, but that learned Judge, in addressing the Society of Arts in English and Indian Criminal Procedure (24th May 1900), admitted the force of the objections which have been taken to a complete separation of functions in India, and gave it as his opinion that "such a separation, as far as it is possible, is essential to good government

16 The memorial is supported by a number of illustrative cases, collected by Mr Monomohun Ghose I have been through the Calcutta Law Reports for the period covered by these cases, and have ascertained that Mr Ghose is rather given to stating his own inferences and conjectures, as if they were matter of fact, he also omits facts which ought in fairness to have been stated To avoid embarassing my argument with details, I put up a supplementary note on the Bengal cases cited by Mr Monomohun Ghose and Mr Justice Madhub Ghose In addressing the Secretary of State we are entitled to point out that the cases sent with the memorial extend over 18 years, that where any act of grave injustice is charged the High Court or the local Government supplied the appropriate remedy, and that some of the acts complained of are now rendered impossible by the amended Code of Criminal Procedure Taking them all together, I should submit that the cases do not warrant any general conclusion as to the administration of Justice in Bengal

17 Without accepting the argument or the assertions of the memorial, the Government of India were of opinion that it gave an opportunity to re-consider and re-state the views of Government on a momentous question of administration Inquiries were addressed to local Governments and to the High Court of Bengal, and the replies are now before Government The question has often been discussed before, and the replies are on familiar lines Local Governments deprecate the application of the abstract principle of separation, at the same time they claim credit for having applied that principle to Civil Courts, and there is practically no difference of opinion as to the expediency of assigning Civil justice and the higher branches of Criminal Justice to purely Judicial officers Local Governments (with the exception of Sir H Cotton) are opposed to any interference with the powers now exercised by District Magistrates and on this point Sir J F Stephen's Minute is quoted as an authoritative exposition of the true policy of Government

18 The High Courts furnish weighty opinions in favour of separation, but unfortunately they are opinions and nothing more there is a general unwillingness to condescend to facts The Chief Justice of Bengal and the Chief Justice of Madras darkly intimate that they could a tale unfold, but they do not unfold it Mr Justice Madhub Ghose refers to reported cases, one of which (as shown in my supplementary note) is to the point The Chief Justice of Bombay gives a case in which a military officer made a mistake in administering plague

rules one doubts whether His Lordship can be serious Mr Justice Tyabji follows suit with more plague cases The Registrar of the Calcutta High Court is directed to say, in effect, that the Judges know of cases of abuse, but do not feel justified in employing a clerk to look them out This, I respectfully suggest, is not a proper answer for a High Court to make If the advocates of complete separation are right, cases of hardship must often occur, and the Judges should spare no pains to furnish Government with the materials for a proper decision

19 I do not propose to comment in detail on the cases sent up from Provinces other than Bengal, because I agree generally with what the Hon'ble Mr Hewett has written in his Secretarial note Two observations may be made on the papers now before Government

In the first place, assuming that cases of abuse have been brought to light, no attempt has been made to determine what proportion these cases bear to the total volume of judicial work No system is perfect I could from my own experience furnish a few cases in which English Judges or Magistrates have shewn undue eagerness to convict, but I do not present these occasional failures as samples of English justice

In the second place, no attempt is made to compare the working of our present system with the probable working of a system of complete separation Deprive the District Magistrate of his judicial powers and he will still be the head of the district, a person to whom Deputy Magistrates and others will readily defer I have been going through some of the cases which came before the Government of India during my time in Council,—the Chapra case, the Jherria Colliery case, etc ,—and I cannot find one in which the head of a district was charged with abuse of his *Judicial* authority The real danger lies in the indiscreet or over-zealous use of *Executive* powers, and this can only be prevented by good training and firm discipline

20 There are many practical reforms which I should like to see carried out, in the interest of our judicial service But I feel that by accepting this plank in the Congress platform the Government of India would hamper their own power for good, and that the benefits to be expected from the course proposed are anything but certain

T R[ALEIGH],—25-1-05

Note on the Bengal Cases cited in support of the proposal to separate Judicial and Executive Functions in India

Mr Monomohan Ghose's cases

I A District Magistrate prosecuted a Babu, who had opposed him at the Municipal Board, on a variety of groundless charges The Sessions Judge was prepared to transfer the case to the High Court, and the proceedings were dropped Sir R Temple reduced the District Magistrate to the rank of a Joint Magistrate, and debarred him from ever being in executive charge of a district The District Magistrate was "transferred to the judicial branch of the service, and was for many years a District Judge" This bears out what I say in my note as to putting the failures of the executive into judicial positions

II The manager of a tea-garden and his assistant tried to prevent some villagers from erecting a *bund*, the assistant fired on the crowd and wounded several men The manager and his assistant were convicted and fined The District Magistrate directed the villagers to be prosecuted for perjury, rioting and nuisance Ultimately the High Court added two months' imprisonment to the fines inflicted on the Europeans, and released the villagers Justice was apparently done in this case, but Sir Charles Elliott, who neither disputes nor disproves the facts as stated above, thinks it enough to say that the District Magistrate was guilty of a "technical irregularity" in transferring the case from the Deputy Magistrate to the Joint Magistrate

III A case was transferred by the High Court because the District Magistrate had written to a Deputy Magistrate, virtually directing him to give the maximum sentence allowed by the Code

IV The Murshidabad Fishery Case I cannot check this, if the facts were as stated, the case resembles the recent case of Mr Maguire Why was no application made to the Local Government?

V No information as to this, except from Mr Ghose himself, who was Counsel for the accused

VI The High Court transferred certain cases, because the District Magistrate, who would have tried them in the ordinary course, had taken an active part in the prosecution Mr. Ghose, who was Counsel in these cases, says that the District Magistrate opposed the transfer, on the ground that his prestige would suffer This fact, if it be a fact, is not mentioned in the judgment of the High Court, which I have seen

VII There is no no VII in the papers

VIII A District Magistrate is said to have found fault with a Deputy Magistrate for passing light sentences The complaint may have been well founded it is well known that Hindu Magistrates are often unwilling to punish.

IX A dispute about land between a *Zemindar* and some Muhammadans The District Magistrate wished the *Zamindar* to sell, and, on his refusing to do so, made an order reviving

prosecution which the Muhammadans had instituted. The order was quashed by the High Court, the Legal Remembrancer assenting Mr Ghose says the Legal Remembrancer wished to avoid a great public scandal, but this appears to be merely conjecture

X The Maldah Enbankment Case The District Magistrate made an injudicious use of his summary powers, and the High Court, while attributing his action to zeal for the public good, set aside the convictions A District Magistrate cannot try such a case himself under the amended Code

XI The dead body of a *tahsildar* was found in a tank near a factory An inquiry was held by the Sub-Divisional Magistrate who made a report The District Magistrate refused to produce this report in judicial proceedings Mr Ghose hints that the whole affair was suspicious The High Court on the other hand held that the District Magistrate was not bound to produce the report, and Maikby, J , said that the District Magistrate had acted with perfect propriety

XII and XIII In a dispute about land, the District Magistrate took the side of the European claimants, and tried to put them into possession by the aid of his police This is admitted to be a bad case , it falls into the same category with the Murshidabad Fishery and Mr Maguire's Colliery Three such cases in a quarter of a century, are three too many

XIV A police officer of one year's standing shot a pet deer, and started an absurd prosecution, first against the owner of the deer, and then against his aunt, for failing to take proper care of a dangerous animal The District Superintendent of Police and the District Magistrate supported their subordinate All three were punished by the Lieutenant-Governor

XV A District Magistrate determined to bring a local fair under his own control and to prevent people from going to a rival fair He instituted groundless prosecutions, which were set aside by the High Court The Lieutenant-Governor took action against the District Magistrate and his subordinates but the punishment was hardly adequate, and the Government of India reduced it

XVI A prosecution, improperly instituted, was set aside by the High Court These cases of unreasonable prosecution are not in point A District Magistrate could prosecute, even if his judicial powers were taken away

XVII A sub-divisional officer locked up two *zamindars* until they agreed to settle a dispute, and to pay a certain sum to Lady Dufferin's Fund if they left the station without permission The High Court held that the signatures of the *zamindars* were obtained by intimidation Sir Charles Elliot took no action, holding as he says himself that his officer had acted "in an extra-legal rather than a legal manner"

XVIII A *zamindar* was guilty of a drunken freak, and was let off with a fine I do not know what, if anything, this case is intended to prove

XIX This is a long story of a quarrel between a District Magistrate and a Raja about a drain The District Magistrate and his Assistant showed a great want of courtesy and discretion, and even Sir Charles Elliott says that the District Magistrate "certainly pushed the theory of his right to control the proceedings of his Subordinate Magistrate to an excessive length" The case was taken up by Lord Stanley of Alderly (House of Lords, 8th May 1893) and Lord Kimberley and Lord Cross made speeches which are frequently referred to in the papers now before us

XX A District Magistrate struck a man for not bringing him a glass of milk A Deputy Magistrate dismissed the man's complaint as "trivial" and "manifestly false," although the District Magistrate was prepared to confess himself in the wrong Sir Charles Elliott says the Deputy Magistrate was suffering from brain trouble

Mr Justice Ghose's Cases.

I *Re* J. Wilson. This was a case from the Santhal Parganas, but as the Judges (Macpherson and Banerjee, JJ) say they "make no reflection on the Sub-Divisional Magistrate's fairness and impartiality," I do not quite understand what the case is meant to prove

II Girish Chunder Ghose A District Magistrate took an active part in putting down an unlawful assembly He then tried the accused himself, and founded his judgment partly on his own observation Trevelyan and Ranpini, JJ , made no reflection on the District Magistrate, but they very properly ordered the accused to be retried by some other Magistrate of the district

III Dupeyren *versus* Driver A Magistrate made an illegal order for a man on bail to show himself daily The High Court said that, whether the Magistrate was in fact biassed or not the case should be transferred

IV Queen-Empress *versus* Sagal Sambo In this case six Manipuris and a Gurkha were convicted by the Sessions Judge of Silchar on charges of dacoity and murder. They were all acquitted by the High Court I suppose Mr Justice Ghose quotes this to show that Sessions Judges should be trained lawyers

Besides the above, the learned Judge refers to the Chapra case, and the case of Mr Maguire.

T R[ALEIGH],—25-1-05

238 H D.

Note on the Division of Executive, Legislative and Judicial Powers

In the Greek city state, the holders of power were closely scrutinised, and the Assembly or the Council was tenacious of its rights Controversy turned on the relations between the Assembly, the executive, and the Courts of law Aristotle was thus led to distinguish the parts on functions of a State, (1) the deliberative, which discussed questions of policy or legislation, (2) that which is concerned with offices, and (3) that which is concerned with courts of justice

This division of powers was worked out in practice in the Greek and Roman city state It was worked out too logically, for ancient republics could not provide themselves with a strong executive For this reason the Greek cities came under the rule of tyrants, and the Roman commonwealth ultimately had to submit to a single ruler

2 Under the Roman Empire, the powers previously divided were concentrated in an individual Justinian, for example, is the supreme legislator—*quod Principi placuit legis habet vigorem* He is also the final Court of appeal, and his ruling, given by way of *mandate* or *rescript*, is binding on all the courts of the Empire

3 This fully developed monarchy was the model on which the States of Modern Europe were formed In each of these States, England among the rest, the King claimed to control every branch of Government Bracton applies the maxim, *quod Principi placuit*, to Henry III, and Mr Maitland gives reasons for thinking that the qualifying passage which puts the Law above the King is a later interpolation But even in Bracton's time, the English people were beginning to work out a division of powers It was thought right that the judges should be persons of learning, and that they should not be dictated to or interfered with by the King In a later age, James I wished to sit in Court and lay down the law, but Chief Justice Coke gave him no encouragement "Though God" he said, "hath endowed Your Highness with great and singular abilities, yet the law is a particular thing"

Again, it was thought that the King ought not to alter the law without the assent of the Baronage and the Commons, and in time the two houses of Parliament were able to insist that their assent should be freely given after free debate

4 When Montesquieu visited England, he found much to criticise, but he noted with approval, *on est très libre ici*, and he perceived that the safeguards of liberty were two—the independence of the Courts of justice and the independence of Parliament Working on these materials, he gave a new precision to the doctrine of division of powers, and he laid down the lines on which the written constitutions of many modern States have been framed

5 The doctrine is both sound and useful, but it is an abstract doctrine and in practice it requires modification And first, it is tolerably evident that the separation of powers cannot be made complete As Bluntschli points out, complete separation would mean nothing but the disintegration of the State, the creation of three independent powers instead of one And again, we must bear in mind that the essence of the doctrine lies in the separation of *functions*, and that this does not necessarily involve separation of *persons* In England, Montesquieu's pattern of liberty, the Lord Chancellor is Judge, Minister of State, and member of the Legislature, and this arrangement, so far from being a mere anomaly, is attended by great advantages, so long as the Lord Chancellor takes care to keep his Judicial and his political *functions* apart

T R[ALEIGH],—25-1-05

Appendix XV.

No. 7427-A, dated the 28th November 1908

From—F. W Duke, Esq, I C.S, Officiating Chief Secretary to the Government of Bengal,

To—The Secretary to the Government of India, Home Department

I am directed to acknowledge the receipt of Sir Herbert Risley's letter No 411, dated Calcutta, the 27th March last, regarding the separation of judicial and executive functions in India I am to say that the Lieutenant Governor has circulated the letter to a number of executive and judicial officers, to some public bodies and to some representative Indian gentlemen I am to forward a copy of the replies which have been received I am to add that Sir Andrew Fraser took the opportunity of the Commissioners' Conference at Darjeeling in October to discuss the matter with the Commissioners of Divisions and Heads of Departments in this province along with a number of Indian gentlemen both Hindu and Muhammadan several of whom represented what may be called the Congress view on the subject I am to submit the following observations on this most important question.

2. In paragraph 3 of Sir Hebert Risley's letter, inclosing an account of the earlier history of this question, it is stated that the last reference to local Governments on the subject disclosed a preponderance of opinion, most marked on the part of executive officers and less certain on the part of judicial officers, against the application of the abstract principle of separation, and in favour of maintaining the existing system without material alteration It is added in paragraph 4 of the letter that this prevented Lord Curzon's Government from dealing with the subject, but that the Governor-General in Council has now arrived at the conclusion that it is "desirable on general grounds that there should be more complete separation of judicial and executive functions and that steps should be taken to that end in those provinces where the conditions are appropriate." The grounds on which this conclusion has been arrived at are not stated, and it appears to the Lieutenant-Governor to be greatly regretted that this should not have been done. The question was so thoroughly threshed out in the previous consideration of it, that it appears to His Honour to be somewhat inexpedient to set aside the opinions then expressed without more clear and definite reason.

3 In paragraph 4 of Sir Herbert Risley's letter, it is stated that the faults of the present system "are manifested in the ordinary appellate and revisional work of the higher judicial tribunals. In one case a sentence is unduly severe, in another a conviction has been obtained on evidence which does not seem to be quite conclusive" This appears to be one of the "general grounds" on which it is desirable to make a complete separation of judicial and executive functions The Lieutenant-Governor considers that the statement as it stands is exceedingly misleading It is surely the experience of all who have anything to do with judicial administration that even in courts presided over by trained lawyers, there are sentences which to the ordinary mind appear unduly severe, there are sentences which we all think absolutely inadequate, and there are often both convictions and acquittals obtained on evidence that by no means convinces us We have had serious instances of these even in the High Court itself lately, instances in respect of some of which no one has had any doubt as to the fact that mistakes have been made. It may also be remarked that we have the ordinary appellate and revisional courts dealing with the judgments of the lower civil tribunals in a manner which shows that they certainly are not free from the human tendency to err.

4 The Government of India go on to say: "These shortcomings arise from the unconscious bias in favour of conviction entertained by the Magistrate who is responsible for the peace of the district, or by the Magistrate who is subordinate to the District Magistrate and sees with his eyes" The Lieutenant Governor thinks that this is a very unfortunate statement indeed to have been made in a document which it was intended to circulate widely among the people. It may perhaps do lasting mischief and be quoted as authoritative by those who are enemies of order It is in His Honour's opinion a very exaggerated statement, and constitutes a libel upon a distinguished body of men, the Magistrates of this country who belong to the Indian Civil Service and to the Provincial Service It is surely also contrary to the evidence of statistics to say that unduly severe sentences and convictions on evidence that does not appear to be conclusive arise from the bias (conscious or otherwise) of the Magistrates when we find that even in cases which have involved police inquiry beforehand the proportion of convictions is under 60 per cent. On the other hand, it ought to be emphasised that there is no body of courts in this country which have aimed as the Magisterial courts have done at unearthing and punishing false cases There is no public feeling in favour of punishing false evidence or of putting down false cases In the civil courts it is often found difficult to persuade Judges, even when the falsity of a case has been established, to revise their original decision or to take steps against the fabricator of false evidence With the Bar, and with those who frequent the courts generally, any attempt to punish false evidence is generally met by more or less of active opposition It is practically regarded too often as a natural and suitable weapon when one comes to court. It is only the Magistrates who

make any real effort towards putting down this terrible abuse, whereby the courts are to a large extent losing the confidence of the people of the country This is the opinion of any one who has experience of judicial work in the interior.

5. Besides this it must be borne in mind that one of the most frequent forms of the miscarriage of justice is the discharge or acquittal of the guilty. That is often a serious danger to the public peace It is too customary to speak as though an acquittal were always absolutely innocuous, if not really meritorious It would be a very serious thing if such a view came to be accepted by the courts. There is a natural tendency to acquit (*a*) from aversion to give pain, (*b*) from aversion to take the trouble to solve a doubt: the accused is often "given the benefit of a doubt," which ought to have been faced and settled; and (*c*) from the desire to avoid appeals. This tendency would be strengthened if the salutary control of the District Magistrate were removed

6. The Government of India next go on to say that although these blunders do not frequently occur, they give rise among an advanced people, of whom the educated are expert in law and ready to assert their rights, "to a general distrust in the impartiality of the Magistrates" Sir Andrew Fraser regrets to say that there is, on the part of many educated men in Bengal and especially in the legal profession, a great jealousy (though he doubts very much if it is distrust) of the criminal courts His Honour believes that this jealousy is largely due to the fact that the greatest care is taken by so many District Magistrates in really getting at the facts of the case and preventing the poorer people from being oppressed by processes of law. The Lieutenant-Governor is entirely unprepared to admit that any real distrust of the Magistracy as a body does exist It is the rarest thing possible to meet with any such feeling Pleaders make such allegations to their clients and to the superior courts, but this is only in the way of their business as they understand it His Honour is unfortunately, however, only too well aware that there are not many villages, where the civil courts are known, where the people do not often discuss them in terms of the strongest condemnation and distrust. The reason for this is that the civil courts are too often out of touch with the people, and occupied only in the consideration of what is laid before them and what takes place within the four walls of the courts. Their subservience to technicalities and legal formalities leads to injustice, with which dissatisfaction is often strongly expressed, and which, were it not for the fatalistic disposition of the people, would frequently have added very much to the discontent and violent resistance to the action of these courts of which we have had experience in some districts of Bengal.

7. The Lieutenant-Governor also considers that this theory of a bias on the part of the Magistrate is really the survival of the memory of former times when the Magistrate had not only to exercise magisterial functions, but was also the actual policeman, the true prosecutor in the case, a state of things which has long passed away. Besides this, it is matter of personal knowledge that not even in England does any man like to go to court, as the accused in a criminal case or as the defendant in a civil suit There is no doubt that the feelings which have been interpreted by some as indicating the belief in a bias on the part of the presiding Magistrate or Judge are really only the objective expression of that subjective sentiment. It is inconsistent with this alleged distrust of the District Magistrate, and it is a very wonderful thing, to find that everywhere the District Officer is regarded as the friend of the weak and the oppressed. They come to him on every occasion in criminal matters, and they do not come to him in vain In civil cases they generally find him unable to give them help of any kind. This itself is not wholly satisfactory in a country like India The people do not understand it. It would be very dangerous if it were the same in criminal cases We should be handing the weak over entirely to the tender mercies of the strong

8. It is stated in this fourth paragraph of Sir Herbert Risley's letter, that the union of magisterial and judicial functions in the same officer is only appropriate to a comparatively primitive stage of development Surely it cannot have been forgotten that in England itself executive (or as they are sometimes called "administrative") and judicial functions are united in the same officers. Justices of the Peace have large powers of both kinds In their judicial capacity they sit to try indictable offences at quarter sessions, and exercise very summary jurisdiction in their petty sessional divisions. In the exercise of their administrative powers they issue warrants and summonses, hold preliminary examinations in the case of indictable offences, take surety of the peace and good behaviour, or dispose of the police and other power at their command for the suppression of unlawful assemblies and riots. These facts regarding the local administration of justice and the maintenance of the peace in England ought not to have been overlooked. The Government of India have unfortunately, in publishing and circulating their letter, given rise in many quarters to the impression that something is done in India which would never for a moment be tolerated in England As a matter of fact, the same system exists in principle in England as exists here Surely it will not be urged that a system in force in England is too primitive and backward for India It need not be said that it is far more suitable and more necessary for India than for England.

9 In the same paragraph it is said that the system "ought no longer to be maintained where a high standard of general education has been reached by a larger proportion of the population." The next sentence shows that this description is meant to apply to "the more advanced districts of Bengal and Eastern Bengal and Assam" It might be well to define the word "advanced" and indicate precisely the points in which the superiority of Bengal Districts is supposed to exist. Events for years have shown inferiority, not superiority, in moral

tone and mental ballast Statistics of education are not all-important, but it is necessary to examine the statistics for a moment The census figures of 1901 for the districts of the Presidency and Burdwan Divisions show a total in the former of 15 64 per cent of males and 1 52 of females, or 8 9 of both classes, as literate, and in Burdwan 18 82 for males, 82 for females and 9 8 for both classes We may exclude the town of Calcutta where the percentage for males is 31 6 and females 11 5, making a total of 24 8, because in Calcutta there is no question of the union of judicial and executive functions The judicial administration of a metropolis stands entirely by itself Excluding Calcutta, the figures for males run, in the Presidency Division, from 10 4 per cent in Nadia to 20 2 in the 24-Parganas, and in Burdwan, from 15 3 in Birbhum to 20 5 in Midnapore In Howrah the percentage is 21 2, but this may, to a certain extent, be regarded as part of Calcutta For the whole of Bengal the figures are 11 06 for males, 57 for females, or a total of 5 77 for both classes Now let it be borne in mind that the word "literate" means simply able to read and write, and no more It is so used in all official reports and in the census figures It surely cannot be said that, when the highest percentage in any district of Bengal proper is only 20 per cent of "literates," a high standard of education has been reached by a large proportion of the population

10 More valuable figures than these are, however, available in the quinquennial report on education, which gives the figures at the close of 1906-07 These figures are more valuable, inasmuch as they show the exceedingly small proportion of males and females who attain to any high standard of education The quinquennial report gives the following figures for the whole of Bengal —

Number of population of school going age.	Scholars	Arts Colleges	Professional Colleges	Secondary Schools	Primary Schools	Training Schools	Other Special Schools	Total.	Private Institutions: Advanced	Private Institutions: Elementary.	Total	Grand Total	
Males, 4,071 092	Males	5,186	2,044	150,773	910 091	1,714	20,360	1 090 128	16,125	34,985	51,110	1,141,238	Male scholars to male population of school going age 28 03
Percentage		17		3·7	22 3							28 0	
Females, 4,128,287	Females	24	10	6,185	117,296	352	1,010	124,880	208	2,040	2,914	127,800	Female scholars to female population of school going age 3 09
Percentage		00001		15	2 8							3 1	
Total 8 199,379	Total	5,190	2,063	156,958	1,027,377	2 066	21,360	1,215,014	16,303	37,631	54,024	1,269,033	15 48

The percentages given in the second and fourth lines of figures show the percentage of males and females, respectively, of school-going age attending various classes of institutions It will be noticed that the percentage of school-going children is much higher than the percentage of literates according to the census This Mr Hornell discusses in paragraph 268 of the quinquennial report 36 per cent of pupils in the primary stages are not reading printed books, and it may probably be taken that at least one-third of the total number of pupils attending primary schools, probably well over one-half, ultimately drop back into illiteracy The number who go on to higher education is shown to be very small It is ridiculous to talk of the standard of education being so high among a large proportion of the people as to demand the change proposed It is dangerous to think so

11 In this fourth paragraph of Sir Herbert Risley's letter is given the scheme of separation in which the Government of India think that the remedy for this state of things will be found The scheme will require very careful examination To the Lieutenant-Governor it appears not to have been very carefully thought out and to require, if the proposed separation should ultimately take place, very careful reconsideration The main changes are to be found in clauses 8, 9, and 10, all of which, while appearing to be technically and theoretically sound, indicate that magnifying of the knowledge of the law as against knowledge of facts and circumstances, which is most dangerous in this country It is very far from certain that the knowledge of the law will be much greater in the senior Magistrate than it is or ought to be, with the proper training, in the District Officer, for the mere practice of routine, while it gives aptitude in disposing of work, need not of necessity give soundness of view either in regard to law or in regard to fact Sir Andrew Fraser thinks that special Deputy Magistrates should, as far as possible, be set apart for criminal work—men fit for and interested in such work—so that it may be done without interruption from other duty and with the capacity that comes of experience His Honour has also pressed most seriously on the Government of India the necessity for a better training in law for all officers There is, however, something quite as important as law There can be little doubt that the intelligent appreciation of the conditions and circumstances of a case which is gained by the District Officer and the other executive officers who at present do judicial work, from their touring though the district and from their consequent knowledge of its circumstances and conditions, cannot be dispensed with in India. Law is a fetish with some people, and this has unfortunately produced very

seriously injurious consequences in India Law ought to be the reasonable and consistent interpretation of facts, and if people get outside of facts and have only theories to guide them, it is very doubtful how far they can do justice, whatever reputation they may have as lawyers

12 Clause 11 of the scheme dealing with boundaries seems to have been drawn up with total disregard of the necessities of the district administration It is not, however, necessary at this point to criticise the scheme fully The High Court, in Mr Muddiman's letter, copy of which is herewith forwarded, have criticised the scheme very fully, and the Lieutenant-Governor thinks that it will be necessary to reconsider it with the aid of expert officers on the spot, if it is decided, in spite of the remonstrance which His Honour feels it his duty to make, to go on with the separation of judicial and executive functions, in Bengal

GCP 13 In paragraph 5 of Sir Herbert Risley's letter it is said that the Government of India, "after much anxious deliberation, have decided to advance cautiously and tentatively towards the separation of judicial and executive in those parts of India where the local conditions render that change possible and appropriate The scheme now outlined represents a large concession to the views of a certain section of educated Indian opinion That concession can only be made if it is accompanied by the most ample security for the preservation of the public peace and for the maintenance of the authority of the District Officer" This statement calls for serious consideration The facts of the case are, that the Government of India consulted Local Governments and their officers, including not only the executive officers but the highest judicial authorities The preponderance of opinion among both was decidedly against any change, yet the Government of India, without letting the Local Governments or other authorities throughout the country know anything about it, have suddenly sprung the matter on the community as settled in the budget speech of the Hon'ble Member in the Home Department The Lieutenant-Governor is not aware of any such action having ever been taken by the Government of India before, and he desires to record, with great respect, his strong opinion that it is a precedent of the most dangerous character If the Government of India thought that the matter had not been properly laid before the Local Governments Sir Andrew Fraser thinks that, in a matter of this great importance, in respect of which the great majority of responsible officers had spoken so strongly, a new reference ought to have been made before the Government of India made any declaration in a contrary sense It has been, in His Honour's opinion, especially deplorable that such a declaration should have been made at a time of unrest when the object of the main agents in producing that unrest is to undermine the efficiency of the district administration and to produce anarchy and contempt for authority

14 In the second place Sir Andrew Fraser thinks that it ought to be very strongly emphasised that this large concession will indeed only be made "to the views of a certain section of educated Indian opinion" It is not stated what section is referred to Only yesterday the Lieutenant-Governor had a conference on another question, in which an Indian of high standing declared that this movement and others referred to were engineered by lawyers, that the lawyers were largely animated by self-interest, and that they practically coerced some weak men to state if not to accept their views He was supported by all the Indian gentlemen present Are these lawyers the men to whom concessions are to be made, which may injure the great body of the people? On the other hand, there is a large section of educated opinion that does not desire the concession, and the people generally as a whole most certainly do not The Lieutenant-Governor would refer to the striking statements made by two of the most influential Muhammadans in Bengal, as contained in their enclosed letters and note on the subject, namely, Nawab Bahadur Saiyid Ameer Hossain, CIE, and Khan Bahadur Abdul Jubbar, CIE, and by two of the leading and most influential Hindu nobles of Bengal, namely, the Maharajadhiraja Bahadur of Burdwan and Maharaja Sir Prodyot Tagore The strong views of the planters of Bihar and the Anglo-Indian Association should also be considered in this connection It is further to be borne in mind and seriously considered that those who are responsible for the preservation of the public peace do not believe that the scheme conduces to secure that object, and that the great body of opinion is that it is detrimental to the authority of the District Officer

15 In the same paragraph the Government of India go on to say that they believe "that the present proposals comply with these essential conditions, that they will in no way weaken the power and influence of the District Officer, and that, by relieving him of functions some of which he rarely exercises while others are comparatively unimportant, they will materially strengthen him as a responsible representative of the Government" The Lieutenant-Governor appointed a small Committee to consider what were the powers that under the scheme would really be taken away from the District Officer and the functions of which he would be relieved, and His Honour is altogether unable to endorse the statement made in this part of Sir Herbert Risley's letter. The statement of the scheme made in that letter is undoubtedly somewhat vague and unsatisfactory, so that it is not quite clear, in regard to certain powers, whether they are to remain with the District Magistrate or not But the list of powers drawn up by the Committee was neither short nor unimportant

16 There are certain powers also which it is proposed to leave him which might easily bring him into direct conflict with the Senior Magistrate and his subordinates he might bind a thief down under section 110 whom the Senior Magistrate had acquitted, or fine a man in possession of land whom the Senior Magistrate might convict of trespass Powers under sections 436, 437 and 438 would involve great difficulties in their exercise Besides there are

many powers which are rarely exercised by the District Magistrate but which it is most important that he should have the power to exercise when necessary It is considerations of this kind that no doubt explain the union of judicial and executive functions in the Magistrates in England In the opinion of the Lieutenant-Governor, however, the most serious result of the proposed separation is the loss of the District Magistrate's control by inspections of Courts, records, registers, etc The Lieutenant-Governor would not object to appeals lying from the subordinate Magistrates to the District and Sessions Judge, if this were desired It would be a great concession to sentiment, in that the District Magistrate would not have the last word in any appealable case If this were thought worth the expense, it might be done But the District Magistrate's power of supervision and inspection is essential to the interests of the people It is notorious that in the Civil Courts cases are carelessly disposed of, great inconvenience is caused to parties and witnesses, an unfair advantage is given to the party with the long purse, and much injustice is done, merely from the want of inspection by an officer with real knowledge of the circumstances of the district Removed from this control the Criminal Courts will become the instruments of more frequent and more serious injustice and oppression than the Civil Courts The latter have to come to a definite finding on the issues between the parties But a lazy or unscrupulous Magistrate can discharge or acquit an accused person on vague grounds of dissatisfaction with the evidence for the prosecution The fate of whole villages may hang on the successful prosecution of a professional bravo or a brutal landlord, and length of purse may prevent success before an unsupervised and vakil-ridden Magistrate

17 The bottom of the agitation is to a great extent this, that the Criminal Courts do not make a distinction between the *Bhadralog* (respectable classes) and the poor A letter like that of Babu Bhupendra Nath Basu is very self-revealing in this connection There is one way in which this feeling in regard to *Bhadralog* comes out strongly in discussions on the subject It is undoubtedly a current opinion that a well-to-do man should be allowed to compromise even such offences as dacoity or branding This is one of the facts which shows how little real advancement there is among many of the so-called educated classes in Bengal. The controlling authority must be strong, and in touch with the circumstances of the locality, to prevent such compromises This explanation of the agitation is of course closely associated with the cognate explanation, namely the desire to advance the pleaders and to make the Judicial Department all powerful No one doubts that the pleaders are at the bottom of this agitation, and they themselves clearly state that what they desire to see is the Criminal Courts made the same as the Civil The reason for this is that the Munsif is out of touch with the outside world, and is confined within the four walls of his Court, so that the pleaders on the one side or the other have it all their own way Nor is there any practical check over the Munsif, so long as his record reads correctly This suits the pleaders well

18 In paragraph 3 of the High Court letter no 2403, dated the 16th July last, to the Home Department, the question is raised why there should be a Senior Magistrate appointed as head of the judicial work of the district, and why it should not be handed over to the Sessions Judge The Court point that the really logical solution of the matter, if it to be decided on the lines that Sir Harvey Adamson had laid down as settled, is that the magisterial staff should be placed under the control of the Sessions Judge just as the Civil Judicial staff is under the Court of the District Judge Sir Andrew Fraser believes that, if any man who knows any district in Bengal thoroughly were asked for his opinion, he would declare that it would be injurious to the administration of justice to have the Criminal Courts in the same position as Civil Courts now occupy Before anything of that sort is done, even if only the judicial interests of the question are considered, and not the executive interests at all, it would be wise to see whether the Civil Courts cannot be improved The Lieutenant-Governor does not propose to enter into the details of the criticism of the scheme by the High Court that is not necessary now It is well, however, to see how the Court recognise the logical outcome of the present proposals, and to point out that experience shows that the results may be most disastrous to the administration of justice

19 Further it is to be noted that the whole of the Criminal Procedure Code is based on the assumption that the District Magistrate is a responsible impartial officer, able to check by the use of a judicial discretion a reckless use of Police powers on the one hand and a total disregard for law, order, and the peace of the district on the other He must also in a sense hold the balance between the Courts and the Police The Police require support as well as control, and they require the one as much as the other They would often be utterly discouraged and thwarted by magistrates unable to understand their difficulties or their position and constantly prone to suspicion of them This would greatly dishearten them in their work One effect of this would be that they would no longer be willing to run the risk of taking up the case of a poor man against a rich man They often do this now, because, the District Officer has always been regarded as the friend of the weak and the oppressed They would not do it merely to try to influence the Courts, where the long-purse has such natural and (at present) inevitable influence

20 Again if the District Officer is to be held in future to be a purely executive officer then the whole of the Criminal Procedure Code must be recast and the limits of his authority and of that of the judiciary clearly defined Another important point which the Government of India appear to have overlooked is that the District Magistrate, and other Magistrates have statutory powers under innumerable sections of various Acts, *e g*, the Arms and Explosives Acts, Excise, Forest, Emigration, etc, etc All these will have to be carefully

revised if a deadlock is not to ensue The matter cannot be settled in a sudden and not very carefully conceived letter The change proposed is one of immense importance which cannot be introduced without great danger unless it is considered fully in every detail

21 In the last paragraph of Sir Herbert Risley's letter attention is invited to the speech of the Hon'ble the Home Member in the Budget Debate on the 27th March last There is nothing in the speech what is not contained in the letter, but there are one or two points which are more fully stated in the former than in the latter One is that "the exercise and control over the Subordinate Magistrates by whom the great bulk of criminal cases are tried is the point where the present system is defective This control indirectly affects the judicial action of the Subordinate Magistrates" It is admitted that there should be control The control by the District Magistrate is easily exercised because he is constantly on tour, able to inspect, and able to come into contact with the work of Magistrate Sir Andrew Fraser's strong view of the importance of this has been already indicated It is not a defect of the present system it is its power for good It is objected that the control is by the officer responsible for the peace of the district, that is to say, by the officer primarily and in the highest degree responsible for the sound and careful administration of justice There is no one who is more interested in the administration of justice in the district than the District Officer It is not true that he is interested in obtaining convictions He is interested in obtaining convictions only of guilty persons Where a Magistrate's returns show an undue proportion of acquittals, he is not censured for acquitting, but inquiry is made as to whether cases are being instituted by the Police with due care and properly treated in Court It is most important that such inquiry should be made The sense of the orders and practice in respect of this inquiry has been grossly misrepresented with a view to strengthen the agitation

22 On the other hand, it is said that, although it is true that there is very little injustice done, yet the evil lies in what may be suspected to be done In this connection the brief but able statement of Mr Carnduff (now of the High Court) herewith forwarded may be read He points out that the safeguards provided by the existing sytem of appeal and revision are such that a District Magistrate, "however misguided, can do little real harm, while the touch he has with the people among whom he tours, and the resultant power he wields for good, are very great" Mr Carnduff thinks that if the appellate jurisdiction over second and third class Magistrates were taken away, the power of the District Officer to do any harm would disappear, and Mr Carnduff would not go further, for this is not the time to embark on a dangerous experiment These are sober words which should not be disregarded The Lieutenant-Governor has not the slightest hesitation in saying that, in view of the safeguards referred to, and in view of the careful supervision exercised by the great majority of the District Magistrates over the Criminal Courts in the district, there is not anywhere in any district the same suspicion and distrust of the Magisterial Courts as there is of the Civil Courts

23 The Hon'ble Member declared that it is absurd to say "that the feeling of distrust is confined to a few educated men and lawyers and is not shared by the common people" It was admitted that, if the people in any province were asked whether they objected to the present system, ninety per cent would reply that they had nothing to complain of But it was added that, "so soon as any of these people comes into contact with the law, his opinions are merged in his lawyers" This remark to a large extent gives the case away It is the lawyer whose opinions we hear, it is not the people, except where a lawyer has, to foster litigation or to explain his failure, abused the Magistrate to his client That it is left to the lawyer to do this, shows how little real distrust of the Magistracy exists among the people They do not learn it from one another Sir Andrew Fraser would repeat that, of the multitudes who come into contact with the civil courts, a most alarming proportion are taught, by their experience of them, discontent and distrust of our judicial administration One reason for this is that these courts are not inspected The other is that they are often ignorant of the circumstances of the district, that they are sometimes deliberately ignorant of these circumstances, that they even go to the length of refusing to accept authentic information in regard to the true circumstances of the district, and that they too often devote themselves to a hide-bound technical exposition of the law entirely guided by the professional gentlemen who appear before them and the evidence which it is altogether unnecessary to characterise brought before them on both sides Recently endeavours had been made to improve matters in this latter respect by bringing the civil courts more into intelligent contact with such work as that of the Settlement Department Through the influence of a broad-minded Judge, who is probably the ablest lawyer in the Civil Service in this province, the Lieutenant-Governor has succeeded in this object in one division No very clear marks of progress are yet apparent elsewhere; but something is being done Similarly efforts have been made to improve the civil courts by inducing and enabling the High Courts to give more attention to inspections But the inspection of the subordinate courts is practically non-existent

24 I am to add that it would be most inaccurate to say that ninety per cent of those who were asked whether they desire the change would be surprised at the question, and would merely ignorantly reply that they had nothing to complain of There are many who object very strongly to any change and who know very well what they are talking about Not only executive and judicial officers but non-official gentlemen have the very strongest view in regard to the impropriety and inexpediency of the change which is proposed I am to refer, for

example, to the very carefully prepared opinions (copies of which are forwarded herewith) submitted by Nawab Bahadur Saiyid Ameer Hossain, C I E, Nawab Abdur Rahaman, Second Judge of the Small Cause Court and Khan Bahadur Abdúl Jubbar, C I E Many others, including, as the papers herewith submitted will themselves show several Hindus, speak in the strongest terms of the inadvisability of the proposed measures

25 We are told, further on in the Hon'ble Member's speech, that the Government of India have decided to take up this matter cautiously and tentatively and to begin their experiment in Bengal The Hon'ble Member informed the Council that he had had the pleasure of discussing the question with Indian gentlemen, and quoted two of these as having advised that the experiment should be made in Bengal, including Eastern Bengal These are the Hon'ble Maharaja Bahadur of Darbhanga and the Hon'ble Mr Gokhale The Lieutenant-Governor regrets to say that he cannot regard either of these gentlemen as entitled to speak with any authority in regard to the question The Maharaja Bahadur of Darbhanga is a zemindar in Behar who has thrown himself to a considerable extent into politics in Bengal But his knowledge of Bengal cannot be regarded as the knowledge of of one who knows the people He never goes about among his people He believes himself even to be in danger among them It is easy to understand how he would support the proposal for he has had experience of the influence which the District Officer can use to defend tenants against an unsympathetic landlord It so happens also that just at the time probably when the Hon'ble Member was consulting the Maharaja Bahadur the latter had a controversy with the District Officer about a matter which did not entirely concern him and in respect of which those directly concerned did not agree with the action of the Maharaja As to the Hon'ble Mr Gokhale he is absolutely and totally ignorant of Bengal and a strong if not violent partisan

26 Far from recognising as satisfactory one reason urged by Sir Harvey Adamson for choosing Bengal for this experiment, the Lieutenant-Governor regards this as being the very reason which ought to lead the Government of India to hesitate before making any move in this direction in that part of the country "It is from Bengal that the cry for separation has come" but from whom? From the same people who have been crying for "Swaraj," and who have by their language and action caused the excesses of which many of their adherents have been guilty and which have rendered necessary recent measures of repression It is a most serious thing to contemplate the effect of this measure at the present time in Bengal Events have occurred since Sir Harvey Adamson spoke which alone may well call for reconsideration of his views

27 The demand for separation is considered to be "more pressing in the two Bengals than elsewhere", and it is added that "one cause may be found in the intellectual character of the Bengalis" It is not precisely said what particular characteristic is referred to, but it may be that it is their somewhat peculiar disrespect for authority "Another cause is the absence of the revenue system which in other provinces brings executive officers into closer touch with the people" It does not apper to the Lieutenant-Governor how it will be easier to manage a district when certain powers have been withdrawn from the executive officers, because these executive officers, have not the great advantage in respect of power and authority which the revenue system of other provinces gives to them there This would surely be an argument for beginning the experiment (if it must be begun at all) somewhere else There is another aspect of this question The Government of India, in Lord Cornwallis' time, handed over the rayats, who were the real sub-proprietors of the soil, into the hands of the zamindars by the permanent settlement The Government by this Act came under the obligation of protecting the poor against the rich and the weak against the strong, even more in Bengal than elsewhere The power of the District Officer is the one means of so protecting the weak How grossly some who should know better misinterpret the plea for the District Officer's prestige! This is not asked for in the interest of the officer, but in the interests of the people He needs power to protect them This is a matter never to be forgotten, we do not fight for the personal "prestige" of the District Officer what do we care for that? We fight for his power to protect the people committed to his charge

28 Another cause is said to be the fact that "there are more lawyers in Bengal than elsewhere" The Lieutenant-Governor recognises that this may have been one of the causes for the proposal to carry through this concession here But he thinks that this fact should operate in precisely the opposite direction and that the influence which it has exercised over the Hon'ble Member ought to be regarded as what he himself would call unconscious influence It is the Bar and the Bar Libraries that have been clamouring for this change They speak from the theoretical rather than the practical side Too often also they speak from the purely selfish view of the case the reason why they want the change is that they want to have their power increased It is by no means a thing required nor desired by men generally It is a very serious view of the case that we are now discussing In many comments on this proposal, and in some of the papers herewith submitted as for example in the note by Khan Bahadur Maulvi Abdul Jubbar, C I E, there is a strong reference made to what is called the "Vakil Raj" This Vakil Raj, or the power of the Bar, is regarded by the people generally as a power which undermines the principles and diminishes the beneficence of British rule Loyal men fear it, and many, who without being very enthusiastically loyal, have a stake in the country, resent it very much.

29 The Vakil raj has been advanced, according to the Indians who think in this way, by several of the measures of Government One of these is our Civil Procedure with its technicalities and its abounding lawyers The whole power in the Civil Courts rest with Munsifs, Subordinate Judges and others who have been trained as lawyers and belong to the legal profession They are generally out of touch with the people, trained in the City Law Colleges full of little else than technicalities, absolutely without sympathy The only voice that is heard within the courts is the voice of the lawyer No man who comes into court without a lawyer feels that he has the slightest chance of getting justice, and all that the majority of the lawyers care about is the fees they win and whatever will make for the winning of the particular case in which they are at the time engaged This is a somewhat harsh description of what prevails over the whole country, but it is a description which will be given by most non-professional Indians who discuss the matter in the interior Besides this, the lawyers have had a very disastrously undue influence, given to them under the unsuitable Local Self-Government franchise of Bengal They have taken into their hands, wherever the elective principle of the Act has been introduced, the whole conduct of local affairs The Maharaja of Darbhanga himself said to the Lieutenant-Governor on one occasion, when His Honour was urging him to state his opinions boldly in a public way "It is your policy which is to blame for the unwillingness of the zemindars to take their place and state their opinions publicly You have thrown all power into the hands of the pleaders They rule the courts They have all the power in the local bodies, and they have a practical monopoly of the Legislative Councils We cannot oppose them" This seems to the Lieutenant-Governor a very serious state of affairs And if the separation of the judicial and executive functions in respect of the criminal administration of our districts is carried out by Government of India, it will undoubtedly extend this system and increase the power of lawyers which is far too strong as it is For one man who honestly holds any doctrinaire theories in favour of the separation of the judicial and executive functions, there are ten who merely wish to see the Courts and the office of the Magistrate in the hands of the Vakils There never was a more purely class agitation

30 The last cause mentioned is "the greater interference by the District Magistrates with police functions in Bengal than in other provinces" It is doubtful whether this is really true At all events the difference between Bengal and other provinces in this respect is less than might be thought Interference is more talked of in Bengal—for talk is epidemic there—but not perhaps much greater Even if the statement be true, it is all events also true that, since the Police Commission, the tendencies have been all the other way The police have already greatly improved The necessity for close supervision is becoming less The principle has also been clearly laid down that unnecessary interference is bad To be efficient the police must now be trusted to work much by themselves This is recognised There is no doubt that this tendency towards the independence of police officers will more and more be felt, as the Superintendents and their subordinates of the higher grades improve There is a final statement made that "the defects of a joinder of functions are most prominent in Bengal" This is really another reason why no change should be made The defects are most prominent in Bengal because of the eager jealous watchfulness of the Bar and the inimical and often unscrupulous criticism of the press If there is any form or appearance of abuse, it cannot escape criticism in Bengal This is therefore no reason for the proposed change of system, for discovered abuses can be set right

31 It is worth while noticing among the papers submitted herewith the unconsciously cynical and very reasonable statement made by the Orissa Association This body supports the separation of judicial and executive functions, but urges that the scheme should be tried in Orissa and not in Bengal It thinks that the trial in Bengal would be unfair owing to the unrest prevailing there Failure which might be due to the state of feeling of the people rather than to defects in the scheme itself might lead to its being condemned, while if it had been tried under more favourable circumstances it might have succeeded There is much to be said for this view It cannot be supposed that the Government of India desire to make an experiment where it is least likely to succeed, for it must be borne in mind that, once an experiment of the kind is made, the step can never be retraced A measure of that kind once introduced can never be rescinded It is necessary to pause and consider carefully before taking such action

32 It is a most serious thing to consider the introduction of this measure at the present time As Khan Bahadur Abdul Jubbar points out the scheme, though it goes too far for wisdom, does not go far enough to satisfy those who clamour for change The Lieutenant Governor is of opinion that it will do nothing but harm Its effect, no matter what may be plausibly said to the contrary, must be to reduce, to some extent at least, the proper authority and power for good of the Executive as represented by the District Officer, and the power of the Executive ought not to be reduced at the present time If there ever was a time when it was necessary to strengthen the Executive, rather than to weaken it, it is the present time, and nothing could be more inopportune than to press this measure now As Maharaja Sir P C Tagore says, "Executive authority should, under existing conditions, be strengthened and not weakened, and means ought to be taken to increase its prestige and not to diminish it It is inadvisable to authorise even experimentally in Bengal the adoption of such a measure, for that would lead to the popular belief that Government, though it is acting cautiously, is desirous of depriving Executive Officers of some of their most important powers Such a belief would be productive of incalculable mischief" Undoubtedly the state of things in Bengal

has been much more clearly revealed and realised since the Hon'ble Member made his speech in Council, and the Lieutenant-Governor cannot help entertaining the hope that in view of the developments that have occurred the Government of India, even if not persuaded that the measure is in itself unsound and inexpedient, will feel that this is the most inopportune time to propose to press for its introduction. It ought to be abandoned or at least indefinitely postponed.

33 The Lieutenant-Governor has indicated that there are a few improvements which he would introduce in the present system, but he does not think it necessary to go into them at present This is not a time for change, or for raising controversy As to the scheme itself, His Honour regards it as mischievous and dangerous It is with great reluctance, and only under a strong sense of duty, that Sir Andrew Fraser has decided to state his views clearly, and to utter the warning which he has uttered He trusts that the scheme may yet be abandoned He does not propose to make any suggestions as to how it might be carried out, if it is not abandoned These would have to be worked out by a Committee of experts with the materials which have been collected His Honour hopes that this will not be necessary, for he is strongly persuaded that the sound sense of most officials and non-officials is opposed to the scheme, and that its results might be most disastrous,

S. G. P. I. Delhi—No. 283 H. D.—25-8-13.—10.

Appendix XVI.

Dated Calcutta, the 31st August 1908

From—Babu Bhupendra Nath Basu,

To—The Chief Secretary to the Government of Bengal

I have the honour to acknowledge receipt of your letter of the 7th July last, regarding the separation of judicial and executive duties in India.

We are deeply grateful that the Government has at last realised the necessity of separating the two functions and is prepared to introduce a tentative scheme in Bengal, east and west. I am not one of those who are disposed to find fault because the whole of their programme is not accepted or carried out at once It is enough for us that the principle for which we in Bengal have been striving so long is recognised, and I am confident that, in course of time, the reform will come in all its fulness.

The case for separation has been so admirably put by Sir Harvey Adamson that hardly anything could be added to what he has said, without weakening its general effect. He very pertinently puts the question "Can any Government be strong whose administration of justice is not entirely above suspicion? The answer must be in the negative" It has been repeatedly asserted by people whose opinion is entitled to weight that the chief bulwark of British rule in India is its administration of justice Few, who are not of the country, can realise the immense hold which the fact, that the subject can freely institute civil suits against the Government and can go up to the King in these cases, has taken possession of the imagination of the people it must be a very strong, and what is more to the purpose, a very just Government, which allows its acts to be challenged in a court of law So far as the administration of civil justice is concerned, except the circumstance that English Civil Judges have not always the requisite training and the requisite knowledge to start with, there is nothing to complain, but it is far otherwise where the question of the administration of criminal justice is concerned. Every Indian feels that the criminal law is "ferocious,"—I may be pardoned for using this expression, any one, reading the Indian Penal Code and not knowing anything of the country, would come to the conclusion that it was meant to operate in a country inhabited purely by criminal classes The treatment again which the accused receive is a matter of serious consideration To the newly-arrived Assistant Magistrate, there is hardly any distinction between the different classes of offenders brought up before him Knowledge in this direction seldom advances with his advance in the service. In Bengal, where the English Civilian does not come into personal contact with the peasantry and the people in the collection of revenue, he has but little opportunity of knowing them He sees the litigants in courts and rarely meets people except on ceremonial visits the result is that if a respectable person happens to be involved as an accused in a criminal case, may God have mercy on him! From the bench he receives no consideration to the police he is a rich prize and his fate can be better imagined than described As regards the humbler people not belonging to the criminal classes, a criminal case means utter ruin by the time he is placed before the Magistrate he is fairly pumped another set of people fleece him during the trial, and if he has the good fortune to be acquitted, he renews life against heavy odds. But if this were the only grievance, it could, I believe, be remedied the worst of it is that the whole criminal administration of justice is in the hands of the police. It is true, and I grieve to say so, thatt the police is largely recruited by my own countrymen and that much of the abuse that we complain of would cease to exist, if the men composing the force were better but service in the police was looked upon so long as derogatory, and it was only failures or scamps in a respectable family who would go to the police force even in its superior grades it is true to some extent even now. As regards the subordinate police force, what makes the *paharawalla* so different from his *confiere*, the *durwans* in the household or the bankers' *kothi*? Both come from the same classes, but where one is insufferably insolent and incorrigibly dishonest, the other is the personation of courtesy and honesty it is because the *paharawalla* has greater powers of harassing the people amongst whom he moves, greater opportunities which he systematically abuses, than the District Superintendent of Police himself, and he knows that he is practically immune from punishment. The simple villager would not dare to complain, and even if he did, he would nowhere be believed against the *paharawalla*, and the pity of it is that the criminal administration of justice practically remains in the hands of this *paharawalla* and the subordinate police. It may be some satisfaction to the official mind that there is such a large percentage of convictions in police cases, but to those who know the country it tells a different tale, the absolute impossibility of getting justice against the police It has often been asked why, having regard to the peace prevailing in the country, the security of life and property to an extent not enjoyed in India under any previous Government, there should be so much discontent, not only amongst the upper classes, but even amongst the masses? To those who know the country the answer is plain: it is the system of administration of criminal justice Every well-wisher of British rule in India is anxious to see that the cause of the people's discontent should be removed, and, in this view, I welcome the scheme of Sir Harvey Adamson, though imperfect and open to objection.

I should respectfully submit that, to secure the independence of the criminal judiciary from all executive interference, they should be placed on the same footing as the civil judiciary, that is to say, their promotion and transfer should be in the hands of the High Court this is essential, for so long as their prospects will depend upon the favour of the Executive Government, people will not have complete faith in their freedom from bias people must feel that their criminal judiciary are absolutely independent of Government control and this is all the more necessary in criminal cases where Government is directly in the position of the prosecution it is not enough that the High Courts should merely be consulted as provided for in Sir Harvey Adamson's scheme that will not give sufficient confidence

The experience that young pleaders in the mufassal gain before appointment as Munsifs is not of much value The B L Examination of the Calcutta University, as it is going to be, will be a sufficient ground work for the future equipment of our judicial officers if after the result of the B L Examination, the High Court appointed both Munsifs and Deputy Magistrates who would be deputed to judicial work without insisting upon the wasting of young life in the purlieus of our law courts, and if these young men were to spend six months under a Munsif and six months under a Deputy Magistrate learning their work and were subject to confirmation upon a departmental examination in the practical work of the administration of civil and criminal justice, the posts of Munsifs and Deputy Magistrates doing judicial work might be rendered interchangeable this would be of great benefit to the service and to the public The High Court might consult the Government in the matter of these appointments, university career, social status and physical and moral fitness being given careful consideration The Government, of course, would retain exclusively in its own hands the appointment of Revenue and Executive officers The appointments exclusively in the power of the High Court, having regard to the present division of Bengal, might be distributed over the two provinces in accordance with the spread of education, representation of minorities, etc.

The head of the administration of criminal justice next to the Sessions Judge should be not the Senior Magistrate, but an officer styled the Assistant District Judge, who may be a member of the Civil Service, a Senior Deputy Magistrate or a Senior Subordinate Judge. It may be said that the "Senior Magistrate" under Sir Harvey Adamson's scheme would discharge precisely the same functions, but there is a considerable difference to the public between a "Magistrate" who has, from the beginning of British rule in Bengal, been associated with an Executive Officer and a Judge who is looked upon as independent of the executive. it is undeniable that people have greater confidence in the decisions of the Munsif who does his work unhampered by the executive Government than in those of the Deputy Magistrate, and, in creating the separation of the judicial and executive functions, this feeling of the people should be respected, and, if possible, taken advantage of

The Assistant District Judge or the Senior Magistrate, howsoever he may be styled, for some time to come at least, must be a Civilian or a Senior Deputy Magistrate or a Senior Subordinate Judge his appointment, promotion and transfer should be subject to the direction and control of the High Court and not less than a definite number should be reserved for Senior Subordinate Judges and Deputy Magistrates. Sir Harvey Adamson, I regret to notice, has fallen into the popular error that there are greater opportunities of having the order in a criminal proceeding revised than in any other country.

To us all it is a matter of regret that it is so · it betokens an unsatisfactory subordinate magistracy who do not enjoy the confidence either of the Government or the people it may be permissible, however, to point out that, in England, the right of appeal to the High Court has recently been extended to persons convicted by a highly trained judiciary deciding with the aid of a jury, who cannot be said to be ignorant of the surroundings or circumstances of the accused.

Appendix XVII.

No 3036-A, dated the 9th July 1909

From—The Hon'ble Mr. P C Lyon, C S I., I.C S., Chief Secretary to the Government of Eastern Bengal and Assam,

To—The Secretary to the Government of India, Home Department

I am desired to acknowledge the receipt of your letter no 412, dated the 27th March 1908, and to submit herewith the report called for therein on the question of the separation of the judicial and the executive functions I am to express the Lieutenant-Governor's regret that this report should have been so long delayed The complexity and the importance of the subject required careful enquiry and consultation with many officers, and the diversity of the views that have been expressed has made it difficult to deal with the scheme that has been put forward by the Government of India

2 The principle which underlies this problem—that the officer who enquires into a case should have nothing to do with the trial and the conviction of the offender—is one which in the Lieutenant-Governor's opinion, is likely to meet with general acceptance It is the logical outcome of the whole of the British judicial system, and will commend itself to all who have to consider the subject theoretically and without the disturbing factors introduced by local conditions It must, however, be borne in mind that the idea is British, and that it does not prevail to any marked extent among other Western nations, that there are marked exceptions to its application in England itself, and that in Oriental countries it is practically unknown. And the local conditions in this province are such that it appears to the Government to be doubtful whether any hasty introduction of the changes to which the practical adoption of the principle would lead would not endanger the smooth running of the machinery of administration, and seriously prejudice the position of the District Officer In these circumstances, the decision of the Government of India that any advance on the lines suggested must be cautious and tentative indicates the only safe policy, and in view of the conditions which render the proposed advance a matter of special difficulty at the present time, it has been noted with satisfaction by this Government that the Hon'ble Sir Harvey Adamson, in his speech in Council, emphasised the point that the scheme which has been published for criticism is only a suggestion submitted for the consideration of the public and the Governments addressed and is not to be looked upon as a final solution of the problem.

3 The view that the advance should be made with the greatest caution is strengthened by the fact that it is to be undertaken as a concession to public opinion, which is entirely swayed by lawyers in this matter, and by the reflection that it must proceed on theoretical lines, no new facts having been established and no new circumstances have arisen which would lend support to it since the attack made upon the present system was so conclusively disposed of in the correspondence to which the Government of India have referred The expressions of public opinion on this subject have been more numerous in Bengal than elsewhere, because lawyers are ubiquitous in that province, and the Lieutenant-Governor ventures to deprecate the suggestion, made both in the Government of India's letter and in the speech referred to above, that a change is called for in Bengal and in Eastern Bengal which is not desirable elsewhere Sir Lancelot Hare is unaware of any grounds for the suspicion that magisterial interference with police functions is greater in these provinces than in others, and he is not prepared to admit that any proof has been given of a bias towards conviction in magisterial courts. It is unnecessary to adduce the union of these functions to account for severe sentences or doubtful convictions It does not appear, as has been alleged, that there has been anything in the nature of a general failure of justice where such union prevails, and it is not clear that the statistics of acquittals have been considered at all These acquittals rarely come before the appellate courts and are never the subject of public criticism in Indian newspapers or assemblies, and yet the whole mass of judicial work, acquittals as well as convictions, should apparently be considered before any general conclusions such as those now stated can be put forward And in this connection I am to suggest that the paragraphs which deal with this subject in the Police Commission's Report of 1902-03 are worthy of careful consideration That Commission dealt exhaustively with the question of the disposal of magisterial work and the connection of Magistrates with the police, and the decisions they arrived at have undoubtedly an important bearing upon the subject under discussion.

4 Nor can it be admitted that such "distrust and dissatisfaction" as has been expressed with the work of our courts, if any such is really to be found among the people at large, is attributable to the union of executive and judicial functions There can be little doubt that the civil courts are as severely criticised by the people, and are the cause of far greater inconvenience and trouble to them, than the criminal courts, while such criticisms as are expressed in the writings of Indian gentlemen and the speeches made at public gatherings have been recently directed more against Sessions Judges, Presidency Magistrates, and certain Judges of the High Court than against Magistrates in the mufassil The Government of

India are well aware of the animus which inspires much of the criticism of the judicial work in criminal courts in Bengal and in Eastern Bengal, and I am to suggest that it is unnecessary to analyse it very closely to arrive at an appreciation of its real value

5 In another respect also I am respectfully to submit that the remarks in the 4th paragraph of the Government of India's letter appear to rest upon a basis of doubtful security, and that is with reference to "the high standard of education that has been reached by a large proportion of the population" in this province It seems desirable to invite attention to the statistics of education in Eastern Bengal, as they go far to show that the general ideas that are prevalent on this subject give a greatly exaggerated view as to the progress that has been made When considering western theories such as those connected with this question, and indeed for all practical educational purposes in India no person can be said to have attained to "a high standard of education" unless he is at least literate in English, and an examination of the last census returns shows that of the total male population over 15 years of age in Eastern Bengal, only 9 per cent are literate in English, a figure which falls below those for any other of the larger provinces in India except the United Provinces and Burma And even if vernacular literacy be considered, this province has only 14 per cent of literates in the same population and is again beaten by all provinces in India except two While the Lieutenant-Governor is proud that a large section of the people comprising the educated Hindus is as advanced as any community in India in education and civilization, and that the proportion of the children of the Province now under instruction is as high as in any other part of the country, the efficient conduct of the criminal administration affects that section and these children less than the general mass of the population, and for the province as a whole no description could be more appropriate than that given by Sir Harvey Adamson of the country "in which a combination of magisterial and police duties is necessary, or is at least not inexpedient" He described such a country as one inhabited by "a simple people, generally peaceful, but having in their character elements capable of producing disorder, who have been accustomed to see all the functions of Government united in one head, and who neither know or desire any other form of administration" Two tabular statements giving detailed information on this subject are attached to this letter as Appendices A and B.

6 There are other grounds on which the argument for moving with great caution in this matter can be supported, and among them may be cited (*a*) the desirability of deferring any great changes in this direction until some progress has been made in the work of decentralization, which has been laid before the Government of India by the Royal Commission, (*b*) the advantage that would be gained by the full discussion of such a subject as this in the reformed Legislative Councils, and (*c*) the impoverished condition of Indian finances at the present time, which renders any large expenditure on theoretical reforms a matter of doubtful expediency. It will be impossible to carry out any effective scheme for the early and complete separation of judicial and executive functions without incurring very heavy cost, and the Government would submit that it is not in a position to meet that cost from Provincial funds at the present time without checking the development of the province in a manner that would be little short of disastrous.

7. The Lieutenant-Governor has felt it necessary to lay stress in the preceding paragraphs upon the objections which may rightly be taken in his opinion to any large concession to the very limited public opinion that has been expressed upon this subject, but he does not wish thereby to detract from the importance of the principle involved or from his acceptance of it There can be no doubt that the development of the judicial system that has been introduced into India must be in the direction indicated, and that as judicial work increases it must become more and more divorced from the performance of executive duties, and tend to become an entirely separate branch of the administration Indeed, this tendency is becoming increasingly evident in Eastern Bengal, owing to the rapid development of magisterial and police work, and the great pressure thus brought upon the District Officer and his staff, and the measures that have been taken to meet the difficulties that have arisen have followed the natural lines indicated above, and have led to a further gradual separation of judicial from executive functions The Government of India are aware that in order to enable the District Officers of the larger and more important districts of the province to cope with their revenue and executive duties, including the adequate control of police work it has become necessary to appoint Additional Magistrates for their assistance These officers are placed in charge of all magisterial work at the headquarters of the districts referred to and do miscellaneous revenue and inspection work, they try important cases which would otherwise have been dealt with by the District Magistrate, and they hear appeals from second and third class Magistrates And this development has been accompanied by another of a like nature, an increase in the number of outlying judicial centres in the mufassal, in order to bring our courts nearer to the people and to make them more accessible This has been rendered necessary by the want of communications and the ignorance of the lower classes of the population, which have facilitated the assumption of judicial powers by local zamindars The Lieutenant-Governor hopes that it may prove possible to meet the wishes of the Government of India in this matter by a further extension of these two modifications of hitherto existing practice, and by the gradual application to them of the principle which it is desired to introduce In a subsequent paragraph of this letter it will be explained how this suggestion can, in the opinion of this Government, be efficiently carried out.

8. Turning now to the scheme which has been suggested for consideration in the 4th and 5th paragraphs of the Government of India's letter, I am desired to note that, as it is proposed

for the present to introduce the scheme into a few selected districts only, it will not be feasible to adopt in their entirety those portions of it which affect the whole cadre of the services of administrative officers in this province The proposals referred to are those contained in clauses (3), (4) and (6) of the 4th paragraph of the letter While it will be possible to secure that the principles underlying those clauses shall be observed in dealing with the experiment to be undertaken it will obviously be impossible to adopt them for general application until the experiment has proved successful and the scheme has been extended to the province generally

9 To take the proposals in detail

(1) and (5)—It can be arranged in the districts selected for the experiment that officers employed upon judicial work shall not be employed upon executive duties, and *vice versa*, and that the deputation of an officer to one or the other branch of work shall be for two years

(2)—The principle that an officer of the Indian Civil Service is to choose the executive or judicial line after a fixed term of years, and will thereafter be employed exclusively upon the work he has selected, is already in operation

(3)—It seems hardly possible to apply this principle to the Provincial Civil Service while the scheme is only in the experimental stage, and the scope of the experiment will not permit of the exclusive appointment of the members of this service upon the work chosen by them, and the Lieutenant-Governor would deprecate its being applied in any case to the Subordinate Civil Service This Service is primarily a revenue service, and its members are only called upon to do magisterial work occasionally It seems inexpedient to constitute a judicial service inferior in quality to the Provincial Civil Service

(4)—The proposal to place junior officers entirely under the orders of Commissioners is dependent upon the adoption of the proposals concerning the choice of a career The extension of the powers of Commissioners in this direction is being dealt with as part of the proposals of the Royal Commission on Decentralization, and it does not appear to the Lieutenant-Governor to be necessary to discuss this point further in connection with the experiment now suggested

(6)—The same remarks apply to the proposal that the High Court should be consulted with reference to the transfer and promotion of officers allotted to the judicial branch This would be fully accepted by the Lieutenant-Governor as a natural corollary to the proposal for the division of the services into judicial and executive branches, but the question does not appear to arise at present

10 The main provisions of the scheme, so far as the initial experiment is concerned, are those contained in clauses (7) to (13) These lay down that, in the selected districts, the staff to be employed upon the trial of criminal cases is to be kept entirely distinct from that employed upon revenue and executive duties For this purpose they provide for the appointment of a Senior Magistrate in each district, to whom the bulk of the judicial functions at present assigned to the District Officer will be entrusted, and for a separation of the subordinate staff, both at head-quarters and in the sub-divisions, for the purposes of magisterial and executive work It is also suggested that executive sub-districts and judicial sub divisions need not in future be conterminous, and that a district may be divided up into such sub-districts and sub-divisions as may be convenient for the disposal of the work to be done and without regard to existing boundaries

In clause (13) it is provided that the District Officer and certain other executive officers shall be empowered as District Magistrates or first class Magistrates for the exercise of the preventive functions of Chapters VIII (omitting section 106) to XII of the Code of Criminal Procedure, and in clause (9) the duties of the Senior Magistrate are specified as follows — (1) the trial of important cases, (2) the hearing of appeals from 2nd and 3rd class Magistrates, (3) the performance of criminal revision work, and (4) the Inspection of Magistrates' courts

11 With reference to the proposal as to the demarcation of sub-districts and sub-divisions, I am desired to invite attention to paragraph 7 of the letter from the Registrar of the High Court to the Government of India, no 2403, dated the 16th July 1908, in which the Hon'ble Judges anticipate some confusion if the areas allotted to sub-districts and sub-divisions do not coincide It is pointed out that the questions of sub treasuries, stamps, sub-jails, and police will occasion difficulty, and that house accommodation will give trouble The Lieutenant-Governor desires to endorse these criticisms At a conference attended by many of his most experienced officers, it was unanimously resolved that the Government of India should be asked to reconsider their suggestion in this matter While it may be necessary in the near future to constitute some Judicial courts in outlying places within existing sub-divisions, it would cause great confusion in the organization of the police force to render sub-districts and sub-divisions independent of each other, and Sir Lancelot Hare trusts that the suggestion will not be pressed

12 The wording of the scheme, so far as it affects the powers of the judicial and executive officers respectively, is not quite clear on the point whether police reports and complaints are to be heard by the judicial or the executive officers The Lieutenant-Governor gathers, however, from the enumeration of the duties of the Senior Magistrate that has been given above, that all functions connected with the prosecution of a case until it is ready for disposal will be entrusted to the executive officers, the actual trial of the cases being left to the judicial branch, and he hopes that this is the intention of the Government of India I am to

suggest that the control of the police, which is to be vested in the executive authorities, involves the taking of all police reports, and it is difficult to differentiate between these reports and ordinary criminal complaints, while to take from the executive officer the hearing of complaints would be to deprive him of one of his most valuable means of gauging the peace of the district, for which he is to be held responsible At the conference of officers referred to above, it was the practically unanimous opinion, in which the Legal Remembrancer to this Government concurred, that the judicial officers should deal with the trial of cases only, and that the work of preliminary investigation into all complaints, whether made to the police or direct to the higher authorities, should be left with the executive officers

13 The question as to the agency by which magisterial work will be supervised and inspected under the new system is one which appears to this Government to require the most careful consideration The change from constant inspection by an officer who has the whole administration of the district in his hands, who is in touch with the people at various points, and who has more opportunities than the judicial officers of ascertaining the true wants and complaints of the lower classes, to that by a judicial officer, who will be concerned more particularly with the technicalties of legal procedure, will be very great, and it may be difficult to prevent some deterioration in the practical efficiency of our criminal courts The Lieutenant-Governor finds himself in cordial agreement with the Hon'ble Sir Harvey Adamson on this point The Hon'ble Member of Council said in the course of his speech in Council —"It is right and essential that the work of the Subordinate Magistrates should be the subject of regular and systematic control, for they cannot be relied on more than any other class of subordinate officials to do their work diligently and intelligently without it" It is true that at present the Civil Courts are but little inspected, owing to the fact that Judges are overworked and have not the time to give to such inspection duties But this is recognised by all who are intimate with these courts to be a most serious defect For the Magistrates' courts the supervision must not be weakened but strengthened After very careful consideration of this subject and with the support of the officers he has consulted upon the point, the Lieutenant-Governor ventures to endorse the opinion expressed by the Hon'ble Judges of the High Court that the judicial work of each district should be placed under the control of the District and Sessions Judge This will not, however, in his opinion, obviate the necessity for the appointment of a Senior Magistrate It would not be desirable to entrust the detailed work of the distribution of cases, criminal revision, and the hearing of appeals from 2nd or 3rd-class Magistrates to an officer of the standing of the District Judge, and it would not be possible for the District Judge to do all the inspection of local courts that is required Moreover, it will be necessary to retain a Magistrate of superior standing at headquarters to try important cases, especially those which concern European British subjects, and the services of such a Magistrate should certainly be utilized to assist the Judge in the inspection of subordinate courts The Lieutenant-Governor would accordingly suggest that the post of Senior Magistrate be included in the grades of Magistrate and Collector, the additional appointments required being distributed over the grades in the usual way, to secure a proper flow of promotion These posts should ordinarily be filled by members of the Indian Civil Service who have chosen the judicial line, but who are not sufficiently senior to obtain appointments as Judges

14 The Lieutenant-Governor does not attach great importance to the proposal made in clause (14), and he notes that the Hon'ble Judges of the High Court have some doubts as to desirability of allowing to an executive officer so much control over the proceedings of a Magistrate Should the proposals made in paragraph 12 of this letter be accepted, almost all work connected with local investigations and preliminary enquiries will be entrusted to the executive officers and this will render it unnecessary to make this stipulation As to clause 15, and the request contained in the last lines of paragraph 5 of the letter, I am desired to forward a draft Bill prepared by the Legal Remembrancer, for the amendment of the Code of Criminal Procedure in accordance with the provisions of the scheme This will be found in Appendix F

15 In order that the experiment to be carried out should be given the best possible trial the Lieutenant-Governor has selected the districts of Dacca and Pabna as those within which it should first be initiated The district of Dacca is the most advanced in the province, and it is in itself of considerable importance, having three sub-divisions and having at its headquarters a Commissioner and the seat of the local Government It would be easier to watch the progress of the experiment at Dacca than anywhere else, and it would be possible to remedy any defects in the scheme that might become apparent with the least delay The district of Pabna is a smaller district and is a less difficult charge than Dacca, though it is by no means insignificant and affords many point of interest to the administration It has one sub-division—an important one—and the adjustment of the relations between landlords and tenants in the interior requires experience and tact

16 Appendix E, which is attached to this letter, gives a rough estimate of the expenditure which will be involved in the introduction of this experiment into the districts of Dacca and Pabna, but while an attempt has been made to prepare a moderate forecast of such expenditure as can at present be anticipated, the Lieutenant-Governor is unable to express any confidence that it will prove exhaustive and has little doubt that experience will disclose the necessity for additions to it In submitting this estimate, I am to suggest that it is essentially necessary to secure that this momentous change in the system of administration shall not lead to the substitution of a cheap agency for the performance of judicial work for that which at present exists In order that justice may be done and the scales held even, it is of the greatest importance that the conduct of trials in the criminal courts, which hold the lives and

liberties of all classes alike in their hands, should not be efficient and should be pure, and any measure that would bring less qualified officers to preside in them, or detract from the efficiency of the supervision or control maintained over them, would have lamentable results

The various items in the estimate will probably be found to be self-explanatory It will be necessary to provide accommodation for most of the officers to be newly appointed, but in many cases they will pay rent for these houses under the rules in force And it will also be necessary to provide for the more complete and efficient representation of the case for the Crown in trials conducted in the new criminal courts, the presiding officers, in which will lack so much of the experience and knowledge of the country which help them at the present time to arrive at the truth

17 It does not seem sufficient, however to provide the Government of India with an estimate of the cost of introducing this new system as an experimental measure, and I am accordingly directed to add a further rough estimate, Appendix D, in which an effort has been made to show the probable additional expenditure that will be involved, should the present proposals be eventually extended to the other districts of Eastern Bengal and to the district of Sylhet I am to note that the cost in one district does not give a clear indication of what the cost will be in another Some districts are less efficiently staffed than others, some are developing more rapidly than others, while the local conditions as to population, the races of which the population is composed, the character of the people, and the standard of intelligence vary so greatly from district to district that the scheme will have to be applied with much elasticity if any degree of success is to be secured And over and above these elements of difficulty, the general extension of the proposals will raise large questions connected with the cadres of the services, which cannot be fully investigated in the present report It will be necessary to secure that the judicial branches of the services do not become unpopular, and so fail to attract their fair proportion of the best men in those services, and this will involve their reorganization in a manner which cannot fail to prove expensive

It will be seen that the introduction of the scheme as an experiment into two districts will involve approximately an expenditure of ₹2,92,007 in capital cost, and ₹2,08,481 in recurring cost, while the rough estimate of the expenditure to be incurred, should the present system be eventually modified on these lines throughout the province, place the figures at ₹23,66,256 for capital cost and ₹15,33,100 for recurring cost These are high figures, but the estimates have been based upon a careful calculation of the actual necessities of the case and this Government is unable to hold out any expectation that they can be reduced Indeed, there can be little doubt that, as suggested in the preceding paragraph, it is probable that experience will show that they are not exhaustive

In excluding the districts of the old province of Assam—with the exception of Sylhet—from participation in the scheme, the Lieutenant-Governor has followed the advice of most of the officers who have served in that province They are practically unanimous in their view that the change is not required in those districts and could not be introduced without serious risk to the administration

18 In the preceding paragraphs the phraseology of the Government of India's letter has been followed, and the action to be taken to introduce the new scheme into a few districts has been referred to as an experiment, but the Lieutenant-Governor would venture to demur to the suggestion that the gradual introduction of this change can be rightly regarded as an experiment, in accordance with the results of which a further advance may subsequently be made In concluding a valuable report upon the whole question, Mr R Nathan, C I E, the Commissioner of the Dacca Division, has remarked —

"The application of the scheme to a few selected districts, manned by officers trained under the present system and under adequate civilian control, will not, it should be recognised, afford any test as to the ultimate success of the proposed new system The crucial time will arrive a number of years hence, after the system has been generally established, and when it is worked by men who have grown up in the altered conditions of the reconstituted services"

The so-called experiment will give us but little experience, as the main feature of the scheme, the absolute separation of the magisterial branch of the service from the executive branch, cannot be carried out until the scheme is extended to the whole or the greater part of the province, and as Mr Nathan points out, this change will take many years to produce its full effects Moreover, Sir Lancelot Hare regrets that he cannot but view this separation with apprehension The divorce of the Magistrates from a practical knowledge of the revenue conditions of the province, from personal acquaintance with the inner working of the police, and from the intimate knowledge of the wants and conditions of the people, which is provided by work on survey and settlement proceedings, as Sub-divisional Officers, and in other executive appointments, will be fraught, in his opinion, with grave danger to their efficiency, and the substitution of a higher standard of knowledge of the law, to be utilised solely within the four walls of a court, does not appear to him to afford adequate compensation And I am to point out that a change of this nature does not appear to be in accord with the teachings of such experience as we have hitherto gained, as it has only recently been found desirable to initiate, with the approval and co-operation of the Hon'ble Judges of the High Court, a system by which all munsifs are deputed for 18 months or two years to executive duties under Settlement Officers, in order that they may receive instruction in survey and settlement work This reform has been dictated by the obvious desirability of affording officers who have had a purely legal training

some real opportunity of obtaining a first-hand knowledge of the revenue and agricultural problems which concern the people whose cases they have to try

And from another point of view, also it seems more than doubtful whether any useful experience will be gained from a limited trial of the system Sir Lancelot Hare cannot admit the existence of any definite evils at which the proposed reform is directed, or which its introduction is expected to amend or exterminate The subject is not one which lends itself to statistical demonstration, as it has not been argued apparently that the figures of convictions are too high when compared with the total number of cases brought to trial, and irregularity in sentences is dependent upon the personal equation, which no administrative changes will affect Popular opinion, as led by lawyers prejudiced in favour of the change, will be an unsafe guide in the matter, and it is obvious that the special care that will be taken to work the new scheme with tact and efficiency will obscure the results attained

19 I have been instructed to demonstrate above, in accordance with the wishes of the Government of India, how the scheme propounded in their letter can be gradually introduced into this province, should it be desired to press its adoption upon the local Government, but I am now desired to refer again to the description that has been given in the 7th paragraph of this letter of the gradual separation of judicial from executive functions that is being effected in this province, owing to the increase in the burden of district administration, and to solicit the favourable consideration of the Government of India for the alternative which the Lieutenant-Governor would offer to the present scheme The principle which underlies the proposals dealt with in this letter is accepted by this Government as a cardinal principle of the administration of justice on British lines, and it has been pointed out that the natural development of our judicial system in India must follow these lines, and is indeed rapidly advancing upon them The Administration has, at the same time, to deal with a problem that is theoretical rather than practical, and with a reform which does not aim so much at the amendment of serious abuses which require urgent remedy, as at the general improvement of the administration of justice In these circumstances, I am to submit that the wisest course will be to accelerate the natural development to which attention has been invited, rather than to introduce radical changes, the final results of which are uncertain, and which are open to serious criticism from the disturbance they will cause

There is not wanting evidence that the tendency to a division between the magisterial and executive branches of the administration of the districts in this province will be greatly accentuated in the near future by the scheme for decentralization which has been prepared by the Royal Commission This scheme will throw increased work and responsibility upon the District Officer, and it is anticipated that it will result in the devolution of much work upon the officers in charge of sub-divisions, who will be entrusted with a larger share in the revenue administration of the district than has hitherto been the case The development of local Self-Government and the resuscitation of the village system of Eastern Bengal, combined with schemes that have already been adumbrated for the constitution of circles within sub-divisions, to be placed in charge of Sub-Deputy Collectors, will bring the Sub-divisional Officer in touch with the people in a manner which has never been known in Bengal since the conclusion of the permanent settlement, and will make it still more difficult for him or for the District Officer to control the magisterial work of their subordinates. The result will be the gradual transfer of all magisterial work to the Additional Magistrates, and the deputation of a certain proportion of the staff at the headquarters of the district and at the sub-divisions to magisterial work under them, the control at present exercised by the District and Sub-divisional Officers over this portion of the staff being eventually removed

20 Sir Lancelot Hare would be prepared to direct this natural development into the channels suggested by the Government of India's proposals by action which would gradually divest the Additional Magistrate and the officers placed under him of all executive functions and bring them under the supervision and control of the District and Sessions Judge They would cease by degrees to deal with police reports, to take up Revenue or Treasury work, or to hear complaints, and Joint-Magistrates would be appointed to assist the District Magistrates, where necessary, in the performance of these duties When these officers had thus been concentrated upon the trial of cases, the transfer of the control over them from the District Officer to the District Judge would be a simple matter, and legislation might then be undertaken to restrict the trial of cases to the staff reserved for the purpose The same process would be followed in the sub-divisions, the more important of which would be gradually strengthened until the assistants given to the Sub-divisional Officer on the magisterial side were able to stand alone, under the supervision and guidance of the Additional Magistrate at headquarters. With these changes would be combined the Government of India's provision that officers were not to be transferred from judicial to executive work, or *vice versâ*, at intervals of less than two years, and also the proposals which would leave the working of the preventive chapters of the Indian Penal Code to the officers of the Executive establishment.

20 The Lieutenant-Governor would claim for his alternative proposals that, while they entirely accept the principle that the Government of India desire to enforce, they provide for a *more certain and steady* advance in the direction desired than could be secured by the introduction of a new scheme, and at the same time co-ordinate the proposed reform with the large changes in the system of administration which must follow upon the adoption of report of the Royal Commission upon Decentralization They make no radical administrative change and require at present no special legislation, while they meet the objections of

those who foresee that the position of the District Officer will be weakened, by converting the change into a gradual process of development which can be checked without friction at any time, should the dangers which are anticipated be realised And they will enable the Government to make full and economical use of the services of its officers by employing the Additional Magistrates and the Magisterial officers in sub-divisions on miscellaneous revenue and general work until such time as the increase of Judicial work is sufficient to occupy their whole time The natural development of the existing judicial system on the lines that have been proposed will thus be encouraged, while the disorganization and consequent loss of efficiency that more drastic measures might produce will be avoided. The very heavy expenditure which the introduction of the new system must entail would also be spread over a number of years and would be restricted to the actual increase rendered necessary by the growing needs of the administration Sir Lancelot Hare ventures to adduce the long experience of administration in Bengal that he and his advisers have enjoyed in support of his proposals, and he confidently recommends them for the acceptance of the Government of India.

Appendix XVIII

No 1582A.—D, dated the 11th June 1909

From—F. W. Duke, Esq, I C S, Offg Chief Secretary to the Government of Bengal, Appointment Department,

To—The Secretary to the Government of India, Home Department

I am directed to acknowledge the receipt of your letter no 330, dated 27th February 1909, in which the Government of India desired to be furnished with full information on the points referred to in paragraph 5 of Sir Herbert Risley's letter no 411, dated 27th March 1908, on the subject of the separation of judicial and executive functions, with a statement of the present Lieutenant-Governor's views on the subject, and with proposals for giving effect to the scheme in the event of its being sanctioned, together with an estimate of the probable cost

2 The information required by the Government of India and a sketch of the specific arrangements which will be necessary in order to give effect to the scheme, should it be carried out, are set forth in a later part, paragraphs 12 to 38, of this letter. Before proceeding to discuss these, however, the Lieutenant-Governor desires to state briefly his views on the main proposal in its relation to the present circumstances of Bengal, and to explain the reasons which have impelled him reluctantly to advise that the introduction of the scheme should be postponed for the present

3 The present Lieutenant-Governor does not share the opinions expressed by his predecessor in my letter of the 28th November 1908 The idea underlying that letter is not merely that the District Magistrate can, and does in fact, habitually exercise influence over the subordinate magistracy, but that it is right that he should do so, in the interest or supposed interest of the poorer classes, and that the withdrawal of his judicial powers and of his control over the magistracy will weaken his authority and impair the efficiency of the administration. Sir Edward Baker's views on this question have been set forth at length in the first 18 paragraphs of his memorandum dated the 11th July 1900, which is in the possession of the Government of India In his judgment the crucial objection to the present system is this, that so long as the Deputy Magistrates, who try criminal cases, are subject to the direct control and supervision of, and so long as their official prospects are liable to be determined by, the officer who is the head of the police and who is responsible for the peace of the district, so long it is humanly certain that in the discharge of their magisterial duties they will not be exclusively guided by judicial considerations. Sir Edward Baker ventures to invite attention to the following remarks recorded by him in the memorandum to which reference has already been made —

"That the District Magistrate will not consciously permit extraneous considerations to enter his mind may be admitted, but it is placing too great strain on human nature to expect any man to exclude them effectually and always. The subordinate Magistrates, alive to the importance to them of their superior's favourable judgment, unconsciously adapt themselves to his unconscious bias I fully believe that they very seldom wittingly do an injustice, but the inevitable result is that criminal trials are not conducted in the atmosphere of cool impartiality which should pervade a court of justice"

4. To this charge, no answer is to be found in Sir Andrew Fraser's letter of the 28th November 1908 In the Lieutenant-Governor's opinion, no answer to it exists, and for that reason it is commonly ignored by those who are in favour of maintaining the present system. Sir Edward Baker holds that it cannot be ignored with safety, and that the feeling to which it has given rise is by no means solely confined to the legal profession, and is not exclusively, though it may be in part, due to their influence It may very well be the case that if an average villager were asked the question, he would reply that he had no complaint to make and felt no doubt as to the impartiality of the Magistrates. So long as he was not concerned in any criminal litigation and saw no immediate likelihood of such a contingency, his answer might be entirely sincere and without reserve. But the moment that he becomes involved in a criminal case, and more especially if he should happen to be challenged by the police, his mental attitude is entirely altered, and he will undoubtedly feel that his chances would be improved if he were not to be tried by an officer who was directly subordinate to the head of the police Whether this feeling arises spontaneously, or whether it is implanted by a pleader, is of little consequence The material fact is that it is there and it is these people, the actual and potential defendants in criminal cases, whose opinions really count, and not those of the great mass of the population, who never enter a criminal court in their lives.

5 There are two points in which the Lieutenant-Governor agrees generally with the views expressed in Sir Andrew Fraser's letter of the 28th November last. The first of these is the frequent inefficiency and carelessness of the subordinate civil courts, due, it is thought, mainly to the absence of any effective supervision by superior judicial officers The other relates to the imperative necessity of providing for constant and effectual control over the subordinate magistrates under the new scheme. Sir Edward Baker feels most strongly that

such control is essential to the success of the scheme, and he is no less convinced that it can never be exercised by the Sessions Judge In this view he is constrained to differ from the opinion expressed by the majority of the Judges of the High Court in their Registrar's letter no 2403, dated 16th July 1908 The reason for this is not merely that the Sessions Judge has neither time nor inclination for the work It goes much deeper than that A Sessions Judge may well be pardoned if he estimates his judicial duties at a higher rate than those which relate to administration and supervision The latter will be the first to go to the wall, as soon as there is any pressure on the time or the energies of the Judge. By the broad minded and conscientious Judge they will be regarded as a *parergon* which may be carried out if he has leisure, but which it is little discredit to omit By the indolent or indifferent officer they will be evaded or fudged Under our judicial system the whole training of a Judge leads him to pay relatively slight regard to those matters of which he is not permitted or required to take judicial cognizance, and it is only the exceptional and not the average officer who can be expected at once to rise superior to the consequences of his training

6 Sir Edward Baker is aware that the views which he holds on this question are not shared by a large body of public opinion in Bengal A majority of the executive and administrative officers of Government, not a few even of the judges, practically the whole body of non-official Europeans in the mufassal and the bulk of those at the Presidency, and some of the most weighty and influential members of the Indian public, are all opposed to the change of system and distrust its anticipated results Sir Edward Baker believes that this feeling is the consequence rather of temperament and inherent dislike of constitutional change than of any reasoned consideration of the measure , and if there were no other element to be taken into account, he would not hesitate to accept the responsibility of advising the Government of India to proceed with the reform forthwith.

7 It is however impossible to confine our attention merely to the intrinsic merits of the measure , we have also to determine whether the social and political conditions of the day are favourable to its successful introduction A careful consideration of this aspect of the matter has led the Lieutenant-Governor, with much regret, to the conclusion that those conditions are not favourable , and that the prospect of opposition will be lessened, and the chances of speedy and cordial acceptance and appreciation by the public will be enhanced, if its inauguration is deferred for a period which, he trusts, need not be of long duration

8 At the present time the political atmosphere of Bengal is distinctly clearer than it was a year ago, and there are grounds for hope that the unrest which has overshadowed the peace of the province is slowly passing away Nevertheless disquieting symptoms are not wanting It is impossible to affirm that anarchical crime has altogether ceased Dacoity, sometimes accompanied by murder, is prevalent to a dangerous extent, and in some cases the objects of the crime are unquestionably of a political character. The activities of the revolutionary party are not yet defunct, and the proceedings of the semi-political societies which have sprung up of late, still require most vigilant observation The tone of the vernacular press, though improving, leaves much to be desired , and it will be necessary for a considerable time to come to maintain a large and costly body of special police both for punitive purposes and for detection On all hands it is acknowledged, and by no one more emphatically than by the Lieutenant-Governor, that at the present juncture it is impossible, with safety, to adopt any measure that would weaken the hands of Government, impair the authority of the District Officer, or alienate the attachment of those classes that are friendly to our rule Sir Edward Baker fully believes, and has repeatedly affirmed, that the separation of judicial and executive duties, if carried out on the lines, and subject to the essential safeguards, provided in the scheme of the Government of India, will have no such injurious effect In his judgment this measure is inevitable, it is righteous, and in the long run it will leave us stronger than before But it is impossible to ignore the fact that that belief is not shared by the great majority of those who form part of the British dominion or who are its loyal adherents and it is certain that the strengthening of the executive power forms no part of the object or anticipation of many of those who advocate the scheme It cannot fail seriously to prejudice the prospects of the reform, if it should be launched amid an environment of distrust and hostility which are none the less deep-seated and sincere because they have been expressed with moderation and reserve.

9. At the present time other great and far reaching constitutional reforms are on the eve of initiation Quite recently, an Indian gentleman has for the first time been appointed a member of the Viceroy's Executive Council The Executive Councils of Madras and Bombay have been enlarged, with the avowed intention of facilitating the appointment of an Indian member Power has been taken—and from the point of view of the present question this is the most important factor of all—power has been taken to create a Council in Bengal on similar lines, and the Lieutenant-Governor will lose no time in recommending that this power be exercised with the least possible delay Lastly, it is in immediate contemplation to expand the Legislative Councils of the provinces, to increase their powers, and to include in their composition a majority of non-official members It is a matter of common knowledge that while these measures have received the cordial support of a large section of the public, they are regarded by another, smaller but highly influential section, as calculated to detract from the vigor and energy of the executive Government and to impart a want of promptitude and efficiency into its action in dealing with offences against the State This feeling is especially marked in regard to the substitution of a Lieutenant-Governor in Council for a Lieutenant-Governor administering the Government alone.

10 The Lieutenant-Governor wholly dissents from this view, and he is confident that a comparatively short experience of the new arrangements will dispel the illusion and dissipate the misapprehensions that now prevail But nothing short of actual experience is likely to carry conviction to the minds of those who doubt, and the Lieutenant-Governor feels that it will be unwise to impose a double burden upon our friendly critics, by compelling them to assimilate, at one and the same time, an unfamiliar form of Government, and a judicial system which is unknown in India outside the Presidency towns Two years' experience of the former will speedily and abundantly justify its adoption and should enormously strengthen the hands of Government in advancing towards the latter Sir Edward Baker believes that the most favourable chance of carrying the separation of judicial from executive functions in Bengal will be secured if its inception is deferred until the constitutional reforms including the creation of an Executive Council for this province shall have been in operation for two years or thereabouts, and he advises that the consideration of this measure be postponed for that period

11 It is a source of extreme disappointment to the Lieutenant-Governor to be compelled to tender this advice, and he is assured that that feeling will be shared by the Government of India, who, like himself have this reform deeply at heart He has felt it his duty to lay before the Governor-General in Council the considerations which have impelled him to this uncongenial conclusion At the same time, he clearly realizes that those considerations may present themselves differently, and less forcibly, to the Government of India than to himself, and if the Supreme Government should eventually be of opinion that they ought not to prevail and that there are no adequate reasons for deferring further the reform which has been so long in contemplation, Sir Edward Baker desires to offer his assurance that no efforts will be wanting on his part, or on that of his officers, to bring it into effect, any carry it through to a successful conclusion In case this view should prevail, the Lieutenant-Governor has had prepared the information asked for by the Government of India in your letter under reply, and has caused to be worked out the specific arrangements which in his judgment will be required for the introduction of the scheme in selected districts of Bengal These, together with an estimate of the cost, are set forth in the following paragraphs of this letter

12 The Lieutenant-Governor considers that the scheme can be first applied with the best chance of success to the metropolitan districts where the conditions approximate more or less to those of the Presidency town in which the system of Police and Magisterial administration is almost exactly what is contemplated under the new scheme It is at once popular and efficient, and the natural course is to extend it first to the places which are nearest in situation and most similar in conditions Besides the districts immediately adjoining Calcutta it is proposed to introduce the scheme into a few others which are easily accessible and where the population is most advanced Those selected are the 24 Parganas, Nadia and Murshidabad in the Presidency Division, and Howrah and Hooghly in the Burdwan Division

13 The application of the scheme to Howrah will necessitate some special adjustments, since Howrah is not at present a district for purposes of land revenue administration, which is carried on from Hooghly The town of Howrah itself, with a population now estimated at about 1,80,000, is similar in many respects to the northern and southern suburbs of Calcutta The population throughout the district is most advanced Railway communications are exceptionally good, with the result that large numbers of persons whose business lies in Calcutta reside in somewhat remote villages His Honour therefore considers that even at the cost of some trouble and expense the scheme should be applied to Howrah, and that for this purpose it should be entirely separated from Hooghly and erected into a full collectorate This is essential because it is only in this way that both a District Officer and a Senior Magistrate can be maintained at Howrah, and His Honour considers that it would be an unjustifiable anomaly to exclude from the operation of the new scheme the place which, outside Calcutta is perhaps the most advanced in the province

14 The present system under which the administration of land revenue and cesses, land registration, settlement, Government estates and partitions, remains at Hoogly, while every other branch of a Collector's work is carried on by the Magistrate, who is also the Convenanted Deputy Collector of Howrah, has long been felt to be anomalous, and from time to time has occasioned some amount of friction Frequent proposals have been made, as yet without success, to rearrange the jurisdictions, and the present occasion might suitably be taken to settle the question The revenue work which will be transferred from Hoogly will suffice to fill the gap in the Collector of Howrah's time which will be occasioned by the transfer of Judicial functions from him Enquiries have recently been made to ascertain how far the transfer of land revenue work to Howrah will meet with opposition from the payers of land revenue and cesses, and the Commissioner reports that so far as they have gone the balance of opinion is in favour of the transfer Some of the ministerial staff would be transferred from Hooghly to Howrah, but some additions will have to be made to the pay attached to the posts of several of them Only some subsidiary alterations to buildings would be needed, and the extra cost involved in entirely separating Howrah from Hooghly would not be great Accordingly in the estimates of cost given later on in this letter the expense of erecting Howrah into a separate collectorate has been included

15 At the present a considerable part of the time of the Magistrate of Howrah is occupied with work connected with the Howrah Municipality, of which he is the elected Chairman The contingency is always present that the Municipal Commissioners might elect some one else as Chairman, in which case there would no longer be full

occupation for both a District Officer and a Senior Magistrate; for, the district, even when the District Officer has the full powers of a Collector, will still be a small charge His Honour considers that the difficulty need not be anticipated If it arises measures will be taken to meet it, but for very many years the Municipal Commissioners have never sought to elect any one but the District Magistrate as their Chairman, and there is nothing in the present condition of local politics which renders it probable that they should do so

16 Statements numbered I to V giving an estimate of the cost of the proposed arrangements in each of the selected districts are appended, and I am now to explain the principal items in these

According to the scheme propounded in paragraph 4 of Sir Herbert Risley's letter of the 27th March 1908, there must be in each district, in addition to the existing District Officer, a senior Magistrate It will be observed that in each case the pay of the Senior Magistrate has been entered at ₹1,500 per mensem It was contemplated in clause 9 of paragraph 4 of the letter just referred to that the Senior Magistrate might be either a Civilian or a Deputy Magistrate of experience Sir Edward Baker is of opinion that in the experimental stage, at any rate for some years at the outside, it is not possible to contemplate the appointment of any Deputy Magistrate as Senior Magistrate We cannot expect from officers of this class the vigour or the authority which will be essential for the control of subordinates recently emancipated from the rule of the District Officer It is not unlikely that the Deputy Magistrates, who will at first be appointed to exercise judicial functions, influenced by popular ideas, will assume that the principal feature of the new system is to be the elimination of all control save the purely judicial control of the appellate and revisional courts It will be essential that they should be disabused of any such ideas as early as possible It is too common a characteristic of even the best Deputy Magistrates that they have a difficulty in asserting their authority over, and in controlling, their subordinates, and in Sir Edward Baker's opinion it would be likely to wreck the scheme if they were employed as senior Magistrates at the commencement Later on, it will probably be found possible to select some of those who have done conspicuously well under the new system

17 For similar reasons His Honour considers it impossible to employ as Senior Magistrates Civilians of the standing of Officiating Joint Magistrates The supervision and control, which have just been insisted on as most essential, can only be exercised if the work is in the hands of reasonably senior and experienced officers The lowest standard that could be accepted in this particular is that of an officiating Magistrate and Collector Further it is of the essence of the scheme that the officers employed should not be liable to transfer They must continue to exercise the same functions and, as far as possible, they should remain in the same districts for a number of years It is therefore necessary that at whatever stage they are first posted to this duty they should continue to rise through the ordinary grades of the service and to draw the pay which they would have drawn in the regular line In the opinion of His Honour an Assistant Magistrate acting as Joint Magistrate would be to deficient in years and experience to be placed in charge of such a post at all Apart from this it would be immediately fatal to the scheme if every Senior Magistrate had to be removed from his post as soon as he had attained the very moderate seniority of officiating Magistrate and Collector

18 The minimum pay of an officiating Magistrate and Collector in this province is ₹1,167 per mensem, and the Lieutenant-Governor proposes that the officers selected should commence upon this pay, and should be seconded, drawing at first the pay of officiating Magistrates and Collectors, and, after they have been definitely posted to the Judicial Branch, that of officiating District and Sessions Judges until they attain the substantive rank of third grade District and Sessions Judge, with the pay of ₹2,000, which should be fixed as the maximum pay of the post of Senior Magistrate The figures which has been taken (₹1,500) closely approximates to the average of all the grades, officiating and substantive, below ₹2,000, and may be accepted as suitable Sir Edward Baker would most strongly deprecate any attempt to cheapen this post, the officers appointed to which must be selected in the first instance for their fitness for judicial work The duty will probably be less popular than that of the executive line, and the pay must be graded so as to allow men to continue in it until they reach the substantive grade of District and Sessions Judge

19 Somewhat similar considerations apply to the selection of Deputy Magistrates It will be observed that these have been entered at the average rate of ₹470 per mensem, which is the average of the pay of all the grades of Deputy Magistrates and Deputy Collectors, but about ₹100 higher than the average pay of all the Deputy Magistrates and Deputy Collectors in the cadre The majority of the Deputy Magistrates selected for this work in metropolitan districts and particularly in the sub-divisions must have already shown some aptitude for judicial work and be possessed of reasonable experience They must be retained for a number of years in the same line, and it is therefore probable that in these particular districts the cost will be somewhat above the average of the province at large

20 So long as the scheme continues in the experimental stage and is confined to a few districts the complete and final separation between the executive and judicial services which is contemplated in Sir Herbert Risley's letter cannot be given effect to All that can be done and what is proposed to be done is toform a carefully selected list of officers for magisterial work, exclusively in the selected districts, and to keep them on that work in those districts under the Senior Magistrates so long as the experiment continues and until it is extended

21 I am now to refer to the details of the proposals district by district, but before doing so to draw attention to a feature common to all the districts, namely that with the single exception of the Lalbagh sub-division in Murshidabad all the existing sub-divisions are proposed to be retained for judicial purposes Everywhere in Bengal unless there are very large Government estates, judicial work occupies the greater part of a Sub-divisional Officer's time Separation of functions will make little difference to the Sub-divisional Officer, who in exchange for the small amount of executive work he has now to do will, in future usually have to do some additional judicial work which used to be performed by a Sub-Deputy Magistrate On the other hand it has been necessary considerably to reduce the number of executive sub-divisions, as otherwise great cost must have been incurred and the officers in charge would not have been fully employed The different areas under the various jurisdictions,—civil, judicial, and executive—may occasion some degree of inconvenience to the public, but this it is sought to minimize by leaving sub-treasuries at the head-quarters of judicial sub-divisions in charge of Sub-Deputy Collectors

22 *24-Parganas*—In the 24-Parganas there are at present the head-quarters and four other sub-divisions—Diamond Harbour, Barrackpore, Barasat and Basirhat The judicial sub-division of Sealdah which comprises a portion of the northern suburbs of Calcutta is left out of account, as the system is already in operation there For judicial purposes it is proposed to retain these five sub-divisions as they are, with the exception that the Joynagar thana will be transferred from the head-quarters to Diamond Harbour For executive purposes there will be four sub-districts—Head-quarters, Diamond Harbour, Barasat including Barrackpore, and Basirhat Although Barrackpore will cease to be an executive sub-district it will be necessary to maintain a sub-treasury in charge of a Sub-Deputy Collector for municipal and excise transactions

23 *Buildings*—A residence for the Senior Magistrate at Alipore would cost, as has been shown in a foot note to Statement I, not less than ₹60,000 It is, however unnecessary to provide this in the experimental stage as the officer can be brought under the Calcutta housing scheme, and a housing allowance at ₹1,295 per annum has accordingly been shown in the recurring expenditure Residences will, however be required at Barasat, Diamond Harbour and Basirhat for the new judicial officers At ₹10,255 each they will cost ₹30,765 A residence for the Sub-Deputy Collector at Barrackpore will cost ₹7,000 Additions to the offices at the four outlying sub-divisions will cost ₹4,000 each, or a total of ₹16,000 The total charges for buildings will therefore be ₹53,765 The maintenance charges of rented buildings need not be considered, but those on offices and additions will come to ₹480 per annum

24 *Staff*—I am to invite a reference to the Statement No I appended hereto, which shows the present and proposed distribution of the staff Similar statements are also appended for each of the other districts concerned The present sanctioned staff at the head-quarters of the 24-parganas is nine Deputy Magistrates and Deputy Collectors on general duty, and two Sub-Deputy Collectors are ordinarily employed There are also two Deputy Collectors, one in charge of the Sunderbans, and the other of excise and income-tax who are permanently required Two others temporarily engaged in special branches of revenue work have not been included in the statement The sub-divisions have each a Sub-divisional Officer, and at Diamond Harbour there is a second officer There is a Sub-Deputy Magistrate and Collector at each sub-division except Barasat The division of work will make a reduction of two ordinary Deputy Magistrates and Deputy Collectors at head-quarters, but four additional officers will be required to take charge of the four executive sub-districts, of which the head-quarters is one, to be in charge of revenue and chaukidari work and the preventive sections of the Criminal Procedure Code The executive officer at Barasat will have charge of the municipalities and factories in the Barrackpore sub-division A Covenanted Deputy Collector will be required for this purpose The net increase in the staff will therefore be one Covenanted Deputy Collector of the rank of Joint Magistrate and Deputy Collector and one Deputy Collector of the Provincial Civil Service

The judicial officer at Barrackpore must also be a civilian A Sub-Deputy Magistrate will have to be kept at Barrackpore for the trial of petty offences Sub-Deputy Collectors will be required at Diamond Harbour and Basirhat where *khasmahals* are numerous A Sub-Deputy Collector will also be required at Barrackpore and at Barasat for excise work and the sub-treasuries This involves a total addition of two Sub-Deputy Collectors

No increase is contemplated in the ministerial staff, but three additional peons will be required The total additional recurring cost in the 24-Parganas is estimated of ₹41,267

25 *Nadia*—There are at present five judicial sub-divisions—Head-quarters, Kushtia, Meherpur, Chuadanga and Ranaghat It is proposed to maintain these as judicial sub-divisions and to have three executive sub-districts, namely—

(1) Kushtia and Chuadanga,

(2) Meherpur, including Daulatpur thana transferred from Kushtia, and Kaliganj thana transferred from the head-quarters,

(3) Head-quarters, including Ranaghat

It is considered necessary to retain a sub-treasury at the head-quarters of the judicial sub-divisions, *i e*, at Chuadanga and Ranaghat This is necessitated by the requirements of

the post offices, civil courts and excise departments Sub-Deputy Collectors will have charge of the sub-treasuries at Chudanga and Ranaghat

26 *Buildings*—A house for the Senior Magistrate will cost Rs32,800 Sub-divisional residences at Kushtia and Meherpur at a cost of Rs10,255 each and residences for Sub-Deputy Collectors at Chuadanga and Ranaghat at Rs4,000 each will come altogether to Rs28,510 Additions to offices at Meherpur and Kushtia at Rs5,000 each will cost Rs10,000, the total cost of buildings is therefore taken at Rs71,310 Repair charges of the offices and additions will cost Rs300 per annum

27 *Staff*—The present sanctioned staff at the head-quarters of the Nadia district is four Deputy Magistrates and Deputy Collectors, and two Sub-Deputy Collectors are ordinarily employed There is a Deputy Magistrate and Deputy Collector at each of the four outlying sub-divisions, and a Sub-Deputy Collector is also employed in each of them, except Meherpur It will not be possible to reduce the staff of Deputy Magistrates and Deputy Collectors at head-quarters on account of the division of work Three Deputy Collectors will be required for the three executive sub-districts and one Sub-Deputy Collector, costing in all Rs19,020 per annum No increase in the ministerial staff will be necessary, but five additional peons will be required Taking the Senior Magistrate into account the total additional recurring cost for the Nadia district will be Rs39,024 per annum

28 *Murshidabad*—Besides the head-quarters there are at present sub-divisions at Lalbagh, Kandi and Jangipur It is proposed to have three judicial sub-divisions—

(1) head-quarters with Lalbagh, excepting the Nobogram and Sagardighi thanas,

(2) Jangipur, including the above two thanas of Lalbagh,

(3) Kandi.

There will be two executive sub-districts—

(1) head-quarters, including, Kandi, and

(2) Lalbagh, including Jangipur

29 *Buildings*—Sub-Deputy Collectors will be required for each of the sub-treasuries at Kandi and Jangipur, and houses will be required for them at a cost of Rs4,000 each or a total of Rs8,000 Additions to offices will be required at Kandi and Jangipur estimated at Rs4,000 for each place, or a total of Rs8,000 The maintenance charges of the new office buildings will amount to Rs240 per annum For the present the head-quarters of the executive sub-district of Lalbagh *come* Jangipur will be retained at Lalbagh simply because there is a residence there The place is, however, inconvenient and eventually a residence will be required either at Lalgola or at Jangipur costing Rs10,255 At the head-quarters at Berhampore a residence must be provided for the Senior Magistrate It is in contemplation to move the Lunatic Asylum to Ranchi, and the Government of India have sanctioned the transfer Should this be effected in two or three years the quarters of the Superintendent could be made available for the Senior Magistrate Till this is done it is hoped that temporary arrangements may be made The total cost of buildings in Murshidabad will therefore come to Rs26,255

Vide Home Department letter no 28, dated 11th January 1906

30 *Staff*—The present district staff consist of four Deputy Magistrates and Deputy Collectors at the head-quarters and three at sub-divisions There are also four Sub-Deputy Magistrates and Collectors The proposed staff on the judicial side will include, besides the Senior Magistrate, a Deputy Magistrate and a Sub-Deputy Magistrate at head-quarters and two Deputy Magistrates for the two outlying sub-divisions. On the executive side there will be required two executive sub-district officers, three Deputy Collectors at the head-quarters and four Sub-Deputy Collectors There will therefore be a total increase of one Deputy Collector costing Rs5,640 per annum and one Sub-Deputy Collector costing Rs2,100 per annum There will be an increase of one clerk and three peons, and the total recurring expenditure is estimated at Rs 27,876 per annum

31 *Howrah*—At present there are two judicial sub-divisions, at the Sadar and at Ulubaria It is proposed to retain these for judicial purposes, but to amalgamate Ulubaria with the head-quarters for executive purposes

32 *Buildings*—During the experimental stage the Senior Magistrate of Howrah may receive an allowance under the Calcutta housing scheme which will come to Rs1,295 and the expense of a new residence need not be incurred Rs1,500 are estimated for additions and alterations to Courts

33 *Staff*—The present staff under the Magistrate and Covenanted Deputy Collector at Howrah consists of four Deputy Magistrates and Deputy Collectors and one Sub-Deputy Collector, while at the Ulubaria sub-division there are one Deputy Magistrate and Deputy Collector and one Sub-Deputy Collector It is proposed that on the judicial side there should be under the Senior Magistrate two Deputy Magistrates and one Sub-Deputy Magistrate at the head-quarters and one Deputy Magistrate at Ulubaria On the executive side there will be under the District Officer three Deputy Collectors at head-quarters and at Ulubaria one Sub-Deputy Collector for the sub-treasury and excise and chaukidari work The net result is an increase of one Deputy Magistrate There will be an increase of four clerks and eight menials costing altogether Rs3,732 annually. The increase in ministerial estab-

lishment is larger than in any other district owing to the transfer of revenue work from Hooghly The total recurring expenditure is estimated at ₹29,795

34 *Hooghly*—The Hooghly district has at present the head-quarters sub-division at Chinsurah, and sub-divisions at Serampore and Arambagh It is proposed to maintain these three as judicial sub-divisions Arambagh will cease to exist as an executive sub-district and will be united with Serampore

35 *Buildings*—Owing to the extensive barrack accommodation at Chinsura no buildings will be required there, but at Serampore a residence will be required for the Joint-Magistrate, which is estimated at ₹17,500 and a court costing ₹8,000 and involving a recurring expenditure of Rs 240 The initial cost for the Hooghly district is therefore estimated at ₹25,500

36 *Staff*—At Hooghly the present sanctioned staff of Deputy Magistrates and Deputy Collectors is six There is also required a Sub-Deputy Collector At present there are two of these officers, but one is only temporarily employed on settlement duty and is not taken into account At Serampore there are one Joint Magistrate and Deputy Collector, one first class Deputy Magistrate and Deputy Collector and one Sub-Deputy Collector At Arambagh there are one first class Deputy Magistrate and Deputy Collector and a Sub-Deputy Collector The total staff, including the Magistrate and Collector, is thirteen. After separation it is estimated that, including the District Officer and the Senior Magistrate, sixteen officers will be required as follows —

At head-quarters, three Deputy Magistrates on the judicial side, on the executive side four Deputy Collectors and one Sub-Deputy Collector

At Serampore, on the judicial side one Joint Magistrate and one Deputy Magistrate, on the executive side one Covenanted Deputy Collector and one Sub-Deputy Collector

At Arambagh, on the judicial side one Deputy Magistrate, on the executive side one Sub-Deputy Collector

The increase in addition to the Senior Magistrate will be a Deputy Magistrate at head-quarters and a Covenanted Deputy Collector for executive work at Serampore It is necessary to maintain a Covenanted Officer at Serampore for work with the mills and municipalities, as well as for the ordinary duties of the post Sub-Deputy Collectors will be required at Serampore and Arambagh for the sub-treasuries, the issue of excise passes and chaukidari and miscellaneous enquiries Besides the pay of the Senior Magistrate there will also be the cost of a Covenanted Deputy Collector, who will be of the rank of Joint-Magistrate and Deputy Collector, on ₹850, including exchange compensation allowance, and a Deputy Magistrate on ₹470

There will be an increase in ministerial establishment of three clerks or muharirs at head-quarters and one at Serampore, and altogether of ten menials, such as peons and orderlies The annual recurring expenditure is estimated at ₹38,484.

37 From the figures stated in this letter it appears that for the five districts the initial cost of buildings will be ₹1,68,075, without at present providing residences for the Senior Magistrates at Alipore, Howrah or Murshidabad or for the Deputy Collector at Lalgola Houses will probably eventually have to be provided at Howrah, Alipore and Lalgola at a further cost of ₹1,10,255 The recurring expenditure amounts to ₹1,76,446 The details of recurring expenditure will be found in Statement VI and those of expenditure on buildings in Statement VII appended hereto As far as possible everything that can be foreseen has been taken into account, and the rate of pay of officers has been calculated on a system which it is hoped will not lead to under-estimates At the same time it is unlikely that nothing should have escaped notice, and it will be remarkable if some portions at any rate of the new scheme do not exceed the estimates Minor items, such as increases in travelling allowance and contingencies, cannot be estimated Buildings in the most expensive part of the province are also very likely to exceed estimates which have generally been based on the standard charges The Lieutenant-Governor would therefore propose to put the cost of the scheme in round figures at Rs 1,80,000 in initial outlay, and probably at Rs 1,90,000 of annual recurring charges Sir Edward Baker is obliged to state in the most explicit manner that provincial revenues are entirely unable to provide for any part of either charge The expense can only be met by assignments from Imperial revenues, and I am to request that if it is decided to proceed with the scheme, assignments to the amounts stated may be made to this province

38 The additional officers required are shewn in Statement VI appended hereto They include—

(*a*) Seven members of the Indian Civil Service of whom five must be of the standing of Magistrate and Collector of the third grade, and two should be of the standing of Joint Magistrate and Deputy Collector,

(*b*) Seven Deputy Magistrates and Deputy Collectors, and

(*c*) Four Sub-Deputy Collectors

All of these must be provided by additions to the respective cadres, as there is no existing reserve from which they can be drawn The additions to the cadres of the Provincial Executive Service and the Subordinate Civil Service will have to be made in grades somewhat above

the average, as the new officers will be employed on duties which require considerable experience

39 It remains, in accordance with the request contained in Sir Herbert Risley's letter, to supply a statement of the modifications in the existing law which will be required In the opinion of the Lieutenant-Governor it would not be convenient to introduce modifications into the text of a large number of Acts, to the effect that they should be read in a particular way in certain districts His Honour has therefore caused to be prepared a draft of a short Bill which provides that in the districts to which it may be extended by notification, there shall be both a Senior Magistrate and a District Officer The former would exercise the functions of a District Magistrate, except those referred to in the schedule The latter would cease to be a Magistrate, but would continue to exercise all the functions of the District Magistrate mentioned in the enactments referred to in the schedule A brief preliminary examination has shown that the number of entries to be made in the schedule will be very great indeed To prepare it in a complete form will require prolonged labour and close scrutiny His Honour considers that this work ought not to be undertaken until the Government of India have definitely decided to adopt the scheme and to introduce legislation of the nature suggested for the division of the functions now performed by the District Magistrate

When the schedule is completed it is hardly to be hoped that it can be flawless and final Power has therefore been taken in the draft Bill to amend the schedule as may be necessary from time to time A copy of the draft Bill will be found amongst the enclosures to this letter

Appendix XIX.

No. 13-Judicial, dated the 21st July 1910

From—His Excellency the Right Honourable the Governor-General in Council,

To—His Majesty's Secretary of State for India

We have the honour to refer to the correspondence ending with Your Lordship's Judicial despatch no. 36, dated the 22nd June 1906, on the subject of the separation of judicial and executive functions in India.

2 With his Judicial despatch no. 47, dated the 3rd August 1899, Lord George Hamilton forwarded a memorial signed by ten gentlemen, seven of whom had held high judicial office in India, on the subject of the separation of judicial and executive duties, in which the memorialists asked that a scheme might be prepared for the complete separation of judicial and executive functions They based their condemnation of the present system to a great extent upon articles which had appeared in *India* and *The Asiatic Quarterly Review*, and upon notes illustrating its alleged evils which were compiled by the late Mr Manomohan Ghosh, a Barrister in large criminal practice, and they expressed approval of a scheme published in *India* in August 1893 by the late Mr. R. C. Dutt, C I E, which purported to separate the executive and judicial services in Bengal "without materially adding to the cost of administration" The memorial was referred to local Governments and the High and Chief Courts and Judicial Commissioners in March 1900 The local Governments were requested to examine the matter on the broad ground of general administrative expediency, as well as on the narrow basis of immediate practicability, financial or otherwise It was pointed out that in many provinces separation had already been carried to a considerable extent especially in the higher grades, and that in some the change was sufficiently recent to allow of an estimate being formed of its results, and it was suggested that some further advance on the same lines might be possible and expedient, if complete separation were not It was explained that what was wanted was a few weighty opinions from reliable and experienced officers who were competent to judge of the questions that had been raised. The highest judicial officers, whether High or Chief Courts or Judicial Commissioners, were in all cases to be consulted, as well as those having executive experience The opinions were to be accompanied by a definite statement of all the cases of abuse which had come to notice during the preceding five years, with an abstract showing, as far as possible from the judgments delivered, in what respect abuse or mis-carriage of justice had arisen in each case from the operation of the present system Attention was specially invited to Mr Dutt's scheme of separation, and the Government of Bengal was requested to scrutinise carefully the contention that it would involve no additional expenditure, and, if the scrutiny showed that additional expenditure would be necessary, to prepare as close an estimate as could be made of the annual cost involved in adopting the scheme.

3. The replies* received to this reference disclosed a preponderance of opinion, most marked on the part of executive officers and less certain on the part of judicial officers, against the application of the abstract principle of separation and in favour of maintaining the existing system without material alteration It was pointed out that the illustrative cases cited in support of separation extended over a period of 18 years, that where any act of grave injustice was charged, the High Court or the local Government had supplied the appropriate remedy, that the cases of abuse were few in number and bore an infinitesimal proportion to the volume of judicial work, that many of them would have been liable to occurrence even under a system of separated functions, and that some of the acts complained of had since been rendered impossible by the amended Code of Criminal Procedure A close examination of the memorial showed that it had been composed without due regard to accuracy and fairness, and that the strong expressions of which it made use were in marked contrast with the caution displayed by the most eminent of the memorialists when they were writing on their own account Finally all the authorities consulted were impressed by the obvious defects of the constructive proposals put forward by the memorialists, which were shown by the Government of Bengal to be likely to cost over 15 lakhs a year in that province alone.

* These replies will be found in the Proceedings of the Government of India, Home Department (Judl), May 1906, nos 190-204 (confidential)

4. We did not fail to attach their fullest weight to the considerations in favour of the existing system which had been put forward so strongly and by so many authorities, both judicial and executive. We decided, however, that there were defects in the existing system, residing mainly in the control exercised over the subordinate magistracy by the executive officer who is responsible for the peace of the district, and we admitted that a combination of functions which is contrary to the western ideals on which the lawyers in this country are trained must tend to inspire, at least in the more advanced provinces, a distrust of the magistracy in those who have business in the courts It may be, as objectors urge, that there is still less faith reposed in the Civil Courts which are free from all suspicion of executive influence. This is due perhaps to the opposite tendency which they evince of placing sole reliance on abstract principles of law divorced from an intimate knowledge of or sympathy with the people,

and we were aware of the danger that this tendency might arise in the case of a magistracy such as might be created independent of the district officer's control However, after anxious consideration of both points of view, we finally decided that it was our duty to devise, if possible, a scheme which would meet the more serious of the objections taken to the present system

5 The arguments in favour of some change in our system were forcibly presented by the then Home Member of our Council, Sir Harvey Adamson, in his speech in the Legislative Council on the 27th March 1908, of which a copy is appended to this despatch It contains in our opinion a much stronger case for a modification of existing arrangements than was to be found in the arguments of the memorialists, and, though as above observed, we fully admitted the weight of the objections against any change, we decided that these objections were not sufficiently strong to outweigh the reasons which inclined us to advance cautiously and tentatively towards the separation of judicial and executive functions in those parts of India where the local conditions rendered that change possible and appropriate The cry for separation had come chiefly from Bengal, and it appeared to us that the need for a separation of police and magisterial functions was more pressing in the two Bengals than elsewhere. One cause may be found in the intellectual character of the Bengali, another in the absence of a revenue system which in other provinces brings executive officers into closer touch with the people, another in the fact that there is no machinery except the police to perform duties that are done elsewhere by the better class of revenue officer, and another in the fact that there are more lawyers in Bengal than elsewhere These may or may not be the real causes, but most certainly the general belief was that the defects of a joinder of functions were most prominent in the Bengals, and it was on those grounds that we came to the conclusion that when a suitable scheme of separation could be devised, a start should be made in these two provinces.

6 It is an easy matter to propose as an abstract principle that magisterial and police functions should be separated, but in the descent to actual details the subject bristles with difficulties We were however then disposed to think that a possible solution of the difficulty might be found in the following tentative scheme of separation —

(1) Judicial and executive functions to be entirely separated to the extent that an officer who is deputed to executive work shall do no judicial work and *vice versâ* except during the short period when he is preparing for departmental examinations

(2) Officers of the Indian Civil Service to choose after a fixed number of years' service whether their future career is to be judicial or executive, and thereafter to be employed solely on the career to which they have been allotted The allotment to depend on choice modified by actuarial considerations

(3) Officers of the executive branch of the provincial civil service, and if possible, members of the subordinate civil service, to be subject to the same conditions as in (2), though the period after which choice is to be exercised may be different.

(4) During the period antecedent to the choice of career, officers of both services to be gazetted by local Governments to commissioners' divisions, and to be deputed to executive or judicial duties under head (1) by the commissioner's order

(5) During this period deputation from executive to judicial or *vice versâ* to be made at intervals not longer than two years.

(6) High Courts to be consulted freely on questions of transfer and promotion of all officers who have been permanently allotted to the judicial branch

(7) Two superior officers to be stationed at the head-quarters of each district, the *district officer* and the *senior magistrate*

(8) The *district officer* to be the executive head of the district, to exercise the revenue functions of the collector and the preventive magisterial powers now vested in the district magistrate, to have control over the police, and to discharge all miscellaneous executive duties of whatever kind.

(9) The magisterial judicial business of the district to be under a *senior magistrate* who should be an officer who has selected the judicial line, either a civilian or a deputy magistrate of experience He should be the head of the magistracy and his duties would be (1) to try important criminal cases, (2) to hear appeals from 2nd and 3rd class magistrates, (3) to perform criminal revision work and (4) to inspect magistrates' courts In districts where these duties do not give him a full day's work he might be appointed an additional district judge and employed in civil work and in inspecting civil courts. If, where the senior magistrate is a deputy magistrate, it is considered inexpedient on account of his lack of experience to give him civil work he might be appointed assistant sessions judge In this capacity he would give relief to the district and sessions judge by trying such sessions cases as might be made over to him.

(10) At head-quarters of districts, where there are at present civilians, deputy collectors and sub-deputy collectors, a certain number to be deputed to executive and the remainder to judicial work,

(11) Sub-divisional boundaries might be re arranged, and each district divided into judicial sub-divisions and executive sub-districts, the boundaries of which need not be coterminous. The area of a judicial sub-division to be such as to give the judicial officer in charge a full day's work, and similarly with executive sub-districts Boundaries to be arranged so as to disturb existing conditions as little as possible.

(12) The staff would similarly be divided into (*a*) executive officers, *viz*, the district officer, a certain number of civilians, deputy collectors and sub-deputy collectors at head-quarters, a civilian or deputy collector in each sub-district, and (*b*) judicial officers, *viz*, the senior magistrate, a certain number of civilians, deputy magistrates and sub-deputy magistrates at head-quarters, a civilian or deputy magistrate in each sub-division.

(13) The district officer to be empowered as a district magistrate, and certain other executive officers to be empowered as first class magistrates, solely for the performance of the preventive functions of chapters VIII (omitting section 106) to XII of the Code of Criminal Procedure

(14) When it should appear to the district officer that the presence of a magistrate is required at any place other than the head-quarters of a magistrate for the purpose of a local enquiry or trial, he might request the senior magistrate to depute a magistrate accordingly, and the senior magistrate should be bound to comply with such requisition.

(15) The scheme to be brought into operation by an Act of the legislature providing that in districts to which it might by notification be applied, certain provisions of various Acts should be read subject to certain modifications

7 The general principle underlying the scheme was that the trial of offences and the control of the magistrates who try them should never devolve on officers who have any connection with the police or with executive duties, while on the other hand the prevention of crime should be a function of the district officer and his executive subordinates who are responsible for the preservation of the peace of the district The scheme outlined above represented a large concession to the views of a certain section of educated Indian opinion That concession could, in our opinion, only be made if it was accompained by the most ample security for the preservation of the public peace and for the maintenance of the authority of the district officer, but we believed that the proposals complied with these essential conditions, that they were not likely to weaken the power and influence of the district officer, and that by relieving him of functions, some of which he rarely exercises while others are comparatively unimportant, they would materially strengthen his position as the responsible represetative of the Government.

8. These proposals were referred to the Governments of Bengal and Eastern Bengal and Assam and to the Hon'ble Judges of the Calcutta High Court for opinion in our Home Secretary's letters of the 27th March and 21st May 1908, copies of which we enclose, and were also made public in the speech of the late Home Member to which we have already referred. In his speech Sir Harvey Adamson took the precaution of making it clear that the scheme did not represent a final expression of our decision, but that it was merely a tentative suggestion thrown out for criticism with the idea of affording assistance in the determination of the problem.

9 The replies of the Governments of Bengal and Eastern Bengal and Assam and the Calcutta High Court to our reference to them are contained in their letters of the 28th November 1908 and 11th June 1909, 9th July 1909 and 16th July 1908 respectively, copies of which we also enclose for Your Lordship's information Sir Andrew Fraser, the late Lieutenant-Governor of Bengal, was strongly opposed to the scheme and, though the present Lieutenant-Governor is in favour of the principle of separation, he objects to the introduction of special means to effect it at the present time, mainly on the ground that in the present social and political conditions it is unwise to adopt a measure which would, in the opinion of a very large number of people, weaken the hands of Government and impair the authority of the district officer, and which might alienate the attachment of classes friendly to British rule. He also points out that the enlargement of the Legislative Councils and the decision that an Executive Council is to be established in Bengal are regarded by an influential section of the public as calculated to detract from the vigour and energy of the Executive Government and to import a want of promptitude and efficiency into its action in dealing with offences against the State He thinks therefore that it will be wise to defer a radical change in the judicial system until the new legislative arrangements have justified themselves, and in support of this conclusion he adds that the provincial revenues cannot sustain any part of the cost of the scheme, which, if introduced in only five districts in the province, is estimated to cause an annual expenditure of Rs. 1,90,000, in addition to an initial outlay of Rs 1,80,000. Sir Lancelot Hare is averse from introducing at the present time any scheme which would involve a violent departure from existing conditions, principally on the grounds that it is very desirable that the question should be discussed fully in the enlarged Councils, that it is inexpedient to make an important change in the judicial system until some progress has been made in the direction of decentralization, and that

the introduction of the proposed measures in two districts alone would cost no less than Rs 2,08,000 a year, in addition to an initial outlay of Rs. 2,92,000, a sum which could not be expended without checking the development of the province in a manner which would be very undesirable Further, he points out in paragraphs 7, 19 and 20 of his letter of the 9th July 1909 that an approach to the separation of functions has already been made in the larger districts of the province by the appointment of additional district magistrates and by an increase in the number of outlying judicial centres in the mufassal, that in the ordinary course of events this process must continue, and that by this means not only is the principle recognised which we aim to establish, but that it is being gradually carried into practice in a manner which involves the least possible dislocation of traditions and of the existing district organisation. This same process is taking place in Bengal, and if pushed to its logical development we are inclined to the belief that it may afford a solution of this thorny question.

10 We have, we believe, sufficiently demonstrated the soundness of the principle, in its application to the more advanced provinces of India of the separation of judicial and executive functions, and have no doubt that effect will eventually be given to it For the present, however, a postponement of any radical and expensive change such as that outlined in paragraph 6 of this despatch is unavoidable. On political grounds it seems out of the question for us at the present time to proceed with a scheme which would be regarded by influential sections of opinion as calculated to weaken the power of the district officer and thereby to detract from the authority of the Government Moreover, as the Lieutenant-Governor of Eastern Bengal and Assam has observed, an important administrative change of the nature contemplated is one on which the enlarged Councils might be expected to express an opinion Even among the professional middle class, which lends to the proposal its chief support, some might hesitate to press for it strongly as soon as they realised what it was likely to cost. They would, it is probable, appreciate the fact that the real issue is not whether separation is desirable in itself, but whether it is so desirable as to take precedence of the improvement of all forms of primary education, of measures to restrict malaria, of general sanitary reform, of extending the resources of local self-governing bodies, and of many other proposals of a popular nature which are now being pressed upon our attention The estimates given above of the cost of introducing the change proposed into a very limited portion of two provinces is sufficient to indicate what a very heavy expenditure would be required if it were brought into force universally. As we have already observed, we think that it is possible that the problem may be solved by continuing the experiment of separation on the lines on which it is already being tried in both Bengals as funds are available and as circumstances demand. We are, however, reluctantly impelled to the conclusion that it would be inadvisable both on political and financial grounds to attempt any more rapid rate of progress towards the goal which we have set before us.

C1HD—100—9-4-13—GCBP Simla

Speech delivered by Sir Harvey Adamson in the Legislative Council on the 27th March 1903

"I propose to say a few words on a subject on which volumes have been written during the past few years—the separation of Judicial and Executive functions in India In 1899 the Secretary of State forwarded to the Government of India a memorial signed by ten gentlemen, seven of whom had held high judicial office in India, in which the memorialists asked that a scheme might be prepared for the complete separation of Judicial and Executive functions They based their condemnation of the existing system largely upon notes illustrating its alleged evils, which were compiled by Mr Manomohan Ghose, a barrister in large criminal practice The memorial was referred to Local Governments and to high judicial officers in India for report, with the result that an enormous mass of correspondence has accumulated. This correspondence disclosed a decided preponderance of opinion in favour of the existing system, but whether it was the weight of the papers or the weight of their contents that has so long deferred a decision of the question is more than I can say The study of the correspondence has been a tedious and laborious process, but, having completed it, I am inclined to think that the consensus of opinion against a change may have been due in great measure to the faulty presentation by the memorialists of the case for separation, as well as to the obvious defects of the constructive proposals put forward by them, which were shown by the Government of Bengal to be likely to cost many lakhs of rupees in that province alone The authors of the memorial, in my view, put their case very feebly when they rested it on a few grave judicial scandals which were alleged to have occurred from time to time It was easy to show that many of these scandals could have occurred even if the functions had been separated. Many who have reported their satisfaction with the existing system have followed the memorialists and been impressed by the comparative infrequency of grave judicial scandals in India having their cause in the joinder of function, and by the certainty of their being exposed to light and remedied Scandals may to some extent exemplify the defects of a system, but there can be no doubt that, whatever system be adopted, scandals must occur. Occasionally, very rarely I hope, we find the unscrupulous officer, less infrequently we find the incompetent officer, but not so seldom do we find the too zealous officer, perfectly conscientious, brimming over with good intentions, determined to remedy evils, but altogether unable to put into proper focus his own powers and duties and the rights of others With officers of these types—and they cannot be altogether eliminated—occasional public scandals must occur, not only in India, but elsewhere, as a perusal of any issue of *Truth* will show. I see no reason for believing that they occur more frequently in India than in England or any other country, but this at least may be said for the Indian system of criminal administration, that in no country in the world is so perfect an opportunity given for redressing such scandals when they occur.

"But though the preponderance of opinion in the correspondence is as I have stated, a deeper search reveals considerable dissatisfaction with the existing system This is expressed chiefly in the reports of judicial officers The faults of the system are not to be gauged by instances of gross judicial scandals They are manifested in the ordinary appellate and revisional work of the higher judicial tribunals In one case a sentence will be more vindictive than might have been expected if the prosecution had been a private one In another a conviction has been obtained on evidence that does not seem to be quite conclusive In short, there is the unconscious bias in favour of a conviction entertained by the Magistrate who is responsible for the peace of the district, or by the Magistrate who is subordinate to that Magistrate and sees with his eyes The exercise of control over the subordinate Magistrates by whom the great bulk of criminal cases are tried is the point where the present system is defective This control indirectly affects the judicial action of the subordinate Magistrates It is right and essential that the work of the subordinate Magistrates should be the subject of regular and systematic control, for they cannot be relied on more than any other class of subordinate officials to do their work diligently and intelligently without it But if the control is exercised by the officer who is responsible for the peace of the district there is the constant danger that the subordinate Magistracy may be unconsciously guided by other than purely judicial considerations I fully believe that subordinate Magistrates very rarely do an injustice wittingly But the inevitable result of the present system is that criminal trials, affecting the general peace of the district, are not always conducted in the atmosphere of cool impartiality which should pervade a Court of Justice Nor does this completely define the evil, which lies not so much in what is done, as in what may be suspected to be done, for it is not enough that the administration of justice should be pure, it can never be the bedrock of our rule unless it is also above suspicion.

"Those who are opposed to a separation of functions are greatly influenced by the belief that the change would materially weaken the power and position of the District Magistrate and would thus impair the authority of the Government of which he is the chief local representative. The objection that stands out in strongest relief is that prestige will be

lowered and authority weakened if the officer who has control of the police and who is responsible for the peace of the district is deprived of control over the Magistracy who try police cases. Let me examine this objection with reference to the varying stages of the progress of a community Under certain circumstances it is undoubtedly necessary that the executive authorities should themselves be the judicial authorities. The most extreme case is the imposition of martial law in a country that is in open rebellion. Proceeding up the scale we come to conditions which I may illustrate by the experience of Upper Burma for some years after the annexation Order had not yet been completely restored and violent crime was prevalent Military law had gone and its place had been taken by civil law of an elementary kind District Magistrates had large powers extending to life and death. The High Court was presided over by the Commissioner, an executive officer The criminal law was relaxed, and evidence was admitted which under the strict rules of interpretation of more advanced system would be excluded All this was rendered absolutely necessary by the conditions of the country Order would never have been restored if the niceties of law as expounded by lawyers had been listened to, or if the police had not gone hand in hand with the judiciary. Proceeding further up the scale we come to the stage of a simple people, generally peaceful, but having in their character elements capable of reproducing disorder, who have been accustomed to see all the functions of Government united in one head, and who neither know nor desire any other form of administration The law has become more intricate and advanced, and it is applied by the courts with all the strictness that is necessary in order to guard the liberties of the people. Examples would be easy to find in India of the present day. So far I have covered the stages in which a combination of magisterial and police duties is either necessary or is at least not inexpedient In these stages the prestige and authority of the Executive are strengthened by a combination of functions. I now come to the case of a people among whom very different ideas prevail The educated have become imbued with Western ideals. Legal knowledge has vastly increased. The lawyers are of the people, and they have derived their inspirations from Western law. Anything short of the most impartial judicial administration is contrary to the principles which they have learned I must say that I have much sympathy with Indian lawyers who devote their energies to making the administration of Indian law as good theoritically and practically as the administration of English law. Well, what happens when a province has reached this stage and still retains a combination of magisterial and police functions ? The inevitable result is that the people are inspired with a distrust of the impartiality of the judiciary You need not tell me that the feeling is confined to a few educated men and lawyers and is not shared by the common people I grant that if the people of such a province were asked one by one whether they objected to a combination of functions, ninety per cent of them would be surprised at the question and would reply that thay had nothing to complain of. But so soon as any one of these people comes into contact with the law his opinions are merged in his lawyer's If his case be other than purely private and ordinary, if for instance he fears that the police have a spite against him, or that the District Magistrate as guardian of the peace of the district has an interest adverse to him, he is immediately imbued by his surroundings with the idea that he cannot expect perfect and impartial justice from the Magistrate. It thus follows that in such a province the combination of functions must inspire a distrust of the Magistracy in all who have business with the courts Can it be said that under such circumstances the combination tends to enhancement of the prestige and authority of the Executive ? Can any Government be strong whose administration of justice is not entirely above suspicion ? The answer must be in the negative The combination of functions in such a condition of society is a direct weakening of the prestige of the Executive

"On these grounds the Government of India have decided to advance cautiously and tentatively towards the separation of Judicial and Executive functions in those parts of India where the local conditions render that change possible and appropriate The experiment may be a costly one, but we think that the object is worthy It has been consistently pressed on us by public opinion in India I have had the pleasure of discussing the question with Indian gentlemen, among others with my colleagues the Hon'ble the Maharaja of Durbhanga and the Hon'ble Mr Gokhale Their advice coincides with my own view, that the advance should be tentative and that a commencement should be made in Bengal including Eastern Bengal. It is from Bengal that the cry for separation has come, and if there is any force in the general principles which I have expounded, it would appear that the need for a separation of police and magisterial functions is more pressing in the two Bengals than elsewhere. One cause may be found in the intellectual character of the Bengali, another in the absence of a revenue system which in other provinces brings executive officers into closer touch with the people, another in the fact that there is no machinery except the police to perform duties that are done elsewhere by the better class of revenue-officer, another in the fact that there are more lawyers in Bengal than elsewhere, and another, I suspect, in the greater interference by the District Magistrate with police functions in Bengal than in other provinces. These may or may not be the real causes, but most certainly the general belief is that the defects of a joinder of functions are most prominent in the Bengalis, and it is on those grounds that we have come to the conclusion that a start should be made in these two provinces"

4. "It is a very easy matter to propose as an abstract principle that magisterial and police functions should be separated, but in the descent to actual details the subject bristles with difficulties. A solution has been attempted, and it is being sent to the two local Governments for criticism. It is desirable that it should be submitted to the criticism of the public at the same time. I may therefore now disclose the details. But in doing so I desire to state clearly

that the tentative solution is not a final expression of the decision of the Government of India, and that it is merely a suggestion thrown out for criticism with the idea of affording assistance in the determination of a most difficult problem The general principle outlined is that the trial of offences and the control of the Magistrates who try them should never devolve on officers who have any connection with the police or with executive duties, while on the other hand the prevention of crime should be a function of the District officer and his executive subordinates who are responsible for the preservation of the peace of the district The outlines of the scheme, stated baldly, and without discussion, are as follows —

(1) Judicial and Executive functions to be entirely separated to the extent that an officer who is deputed to executive work shall do no judicial work, and *vice versâ*, except during the short period when he is preparing for departmental examinations

(2) Officers of the Indian Civil Service to choose after a fixed number of years' service whether their future career is to be judicial or executive, and thereafter to be employed solely on the career to which they have been allotted The allotment to depend on choice modified by actuarial considerations

(3) Officers of the executive branch of the Provincial Civil Service and if possible, members of the Subordinate Civil Service to be subject to the same conditions as in (2), though the period after which choice is to be exercised may be different

(4) During the period antecedent to the choice of career officers of both services to be gazetted to Commissioners' divisions and to be deputed to executive or judicial duties by the Commissioner's order

(5) During this period deputation from executive to judicial or *vice versâ* must be at intervals not longer than two years

(6) High Court to be consulted freely on questions of transfer and promotion of all officers who have been permanently allotted to the judicial branch

(7) Two superior officers to be stationed at the headquarters of each district, the District Officer and the senior Magistrate

(8) The District Officer to be the executive head of the district, to exercise the revenue functions of the Collector and the preventive magisterial powers now vested in the District Magistarate, to have control over the police, and to discharge all miscellaneous executive duties of whatever kind

(9) The magisterial judicial business of the district to be under the senior Magistrate, who will be an officer who has selected the judicial line— either an Indian Civilian or a Deputy Magistrate of experience He will be the head of the Magistracy and his duties will be (1) to try important criminal cases, (2) to hear appeals from second and third class Magistrates, (3) to perform criminal revision work, and (4) to inspect Magistrates' Courts In districts where these duties do not given him a full day's work he may be appointed an additional District Judge and employed in civil work and in inspecting Civil Courts If, where the senior Magistrate is an officer of the Provincial Civil Service, it is considered inexpedient on account of his lack of experience to give him civil work, he may be appointed Assistant Sessions Judge In either capacity he would give relief to the District and Sessions Judge

(10) At headquarters of districts, where there are at present Indian Civilians, Deputy Magistrates and Sub-deputy Collectors, a certain number to be deputed to executive and the remainder to judicial work

(11) Sub-divisional boundaries to be re-arranged, and each district to be divided into judicial sub-divisions and executive sub-districts The boundries of these need not be conterminous The area of a judicial sub-division to be such as to give the judical officer in charge a full day's work, and similarly with executive sub-districts Boundaries to be arranged so as to disturb existing conditions as little as possible

(12) Thus the whole district is divided into—

A Executive—

(*a*) Head-quarters,

(*b*) Sub-districts,

and also into—

B Judicial—

(*a*) Head-quarters,

(*b*) Sub-divisions,

and the staff is divided into—

A Executive, under the District Officer, namely —

(*a*) The District Officer

(*b*) A certain number of Indian Civilians, Deputy Collectors and Sub-deputy Collectors at head-quarters

(*c*) An Indian Civilian or Deputy Collector for each sub-district.

B Judicial, under the senior Magistrate, namely —

(*a*) The senior Magistrate

(*b*) A certain number of Indian Civilians, Deputy Magistrates and Sub-deputy Magistrates at head-quarters

(*c*) An Indian Civilian or Deputy Magistrate for each sub-division

(13) The District Officer to be empowered as a District Magistrate, and certain other executive officers to be empowered as first class Magistrates, solely for the performance of the preventive functions of Chapter VIII (omitting section 106) to Chapter XII of the Code of Criminal Procedure

Appendix XX

No 19-Public, dated the 27th January 1911.

From—His Majesty's Secretary of State for India,

To—His Excellency the Right Honourable the Governor General of India in Council

I have considered in Council the letter of your Excellency's Government in the Home Department, no. 13, of the 21st July 1910, on the long-standing question commonly described as the separation of judicial and executive functions To persons unfamiliar with the facts this description is liable to convey the impression that in India judicial and executive functions are ordinarily united in the same hands This, of course, is by no means the case. The practice of entrusting executive officials with regular civil jurisdiction, which was formerly found convenient in non-regulation districts, now survives only in Upper Burma and in a few backward tracts in other provinces. In four provinces, suits between landlord and tenant come before revenue officials who, from the nature of their duties, are specially qualified to deal with them Elsewhere as a rule, such litigation is disposed of by the regular civil courts The special powers conferred on revenue officers for the purpose of assessing land revenue, fixing fair rents, and disposing of miscellaneous business connected with rent or land revenue are not really of a judicial nature, but are employed in the former case to exercise and safeguard the rights of the State in respect of the land, and, in the latter, to determine complex economic problems on which the ordinary courts are unfitted to adjudicate So far, therefore, as civil justice is concerned, the separation of powers is as complete as the circumstances of the country permit In the department of criminal justice, the superior criminal courts (the High Courts, the Chief Courts, and the Courts of Session) are presided over by judicial officers who have no executive authority. But the District Magistrate, who is the head of the police and has executive control over their investigations of crime, is also empowered to exercise—

(1) Magisterial powers in criminal cases

(2) Special powers for the prevention of offences under Part IV, Chapters VIII to XII, of the Criminal Procedure Code

(3) Appellate powers in the case of magistrates of the second and third classes.

(4) General supervision and control over all magistrates subordinate to him.

2. Subordinate magistrates of all classes, although they have no extra-judicial authority over the police, discharge, in addition to their judicial functions, a variety of miscellaneous executive duties.

3 The subject discussed in Your Excellency's letter thus raises the following issues —

(1) Should the District Magistrate be relieved of his criminal jurisdiction, both original and appellate, and of his powers of controlling and supervising the magisterial work of subordinate magistrates?

(2) If this is done, what provision should be made for the exercise of this preventive jurisdiction?

(3) Should the principle of separation of judicial and executive authority be applied to the case of subordinate magistrates?

4 These questions were first brought to public notice by a resolution passed at the second meeting of the Indian National Congress in 1886, and have been repeated at all subsequent meetings of that body. Twelve years later they formed the subject of a memorial which was transmitted by Lord George Hamilton with his Despatch of 3rd August 1899 for the consideration of Lord Curzon's Government A reference to local Governments and the superior courts showed that the opinions of the judges were equally divided, while executive officers with few exceptions were in favour of maintaining the present system Lord Curzon's Government did not regard the time as opportune for pressing the question rapidly to a decision, and it remained in abeyance until March 1908, when a tentative scheme of separation was put forward by Sir H. Adamson, then Home Member of Your Excellency's Council, in a speech in the Legislative Council. This scheme is set out in paragraph 6 of your letter It is accepted in principle by the Governments of the two provinces, Bengal and Eastern Bengal and Assam, where it was proposed to introduce it, in selected districts, by way of experiment. But the Lieutenant-Governors of both provinces are reluctant to proceed further, even on experimental lines, for political and financial reasons which commend themselves to Your Excellency's Government Sir Lancelot Hare observes that in Eastern Bengal and Assam an approach to the separation of judicial and executive functions is already being made, both at the headquarters of districts and in sub-divisions, by the appointment of additional magistrates whose duties are mainly judicial, and suggests that a solution of the problem may be found in the gradual development of this process. The cost of experimental separation to the extent

indicated in the local Governments' letters is estimated in Bengal at 12,677*l*, and in Eastern Bengal and Assam at 13,863*l*. per annum In addition to this there would be an initial outlay on courts and houses of 12,000*l*. in the former province and 19,467*l*. in the latter.

5. On the whole case, Your Excellency's Government is of opinion that for the more advanced Provinces of India the separation of executive from judicial functions is sound in principle and will in course of time be fully carried out You consider, however, that the particular scheme now under consideration must be postponed for the present, partly because it is inexpedient to take any step that may be deemed likely to weaken the authority of the district officer, and partly by reason of the very heavy expenditure involved. On both of these aspects you anticipate that the enlarged Legislative Councils will desire to express an opinion and you suggest that their views may be affected by the conflicting claims of other administrative improvements. Meanwhile, you suggest that the only action possible is to continue the experiment of partial and provisional separation that is now being tried in Bengal and Eastern Bengal and Assam as funds are available and as circumstances demand.

6 I am in general accord with the conclusions at which you have arrived, and I shall be ready to give my consideration to any definite proposals that you may lay before me whenever financial conditions render a further advance in the direction of separation practicable. Meanwhile I have some observations to make on the scheme for the two provinces of Bengal and Eastern Bengal and Assam described in your letter. In the first place, it appears to me that the designation "senior magistrate" is calculated to obscure the nature of the functions assigned to the head of the magisterial business of the district He will be an officer who has selected the judicial branch, and his duties will for the remainder of his service be purely judicial If he is called senior magistrate this may give rise to misapprehension, and may create the impression that the separation of functions has been imperfectly carried out. I should prefer the designation Joint District and Sessions Judge, or such other title as will indicate the essential character of his duties, and this would have the further advantage of enabling him to assist the District Judge in disposing of sessions cases and in trying civil suits Secondly, I would ask you to consider whether there is any real necessity for relieving sub-divisional magistrates of their administrative functions It is obvious that the financial difficulties which now stand in the way of even a tentative measure of separation would be greatly reduced if it were no longer necessary to remodel the sub-divisional system in the manner proposed in your scheme. Finally, I invite your attention to the great importance of the preventive jurisdiction vested in the district officer, and would suggest that the question of simplifying the procedure by which his preventive authority is exercised, and possibly of enlarging its scope, should be carefully examined

Appendix XXI.

Note by the Hon'ble Sir Reginald Henry Craddock, K C S I, I C S, Chief Commissioner of the Central Provinces, on the separation of Judicial and Executive functions.

This controversy regarding the separation of judicial and executive functions is now becoming an ancient one, and after many years the Government have decided to make a beginning with an attempt to introduce such separation in Bengal I hope that I may be pardoned for saying that the despatches and letters which are connected with this reference indicate more a desire to make a concession to the theoretical merits of such a measure rather than a strong conviction that it is a really urgent and pressing reform required to remove existing and deeply-felt hardships

2 The cry for the separation is one of those cries which by frequent repetition has become elevated into an article of faith by many well-meaning persons who have neither the facilities nor the time, nor the knowledge to investigate how their theories would work out if put into practice, what the cost entailed would be, and whether the advantages to be gained would be so evident and important that the cost would have to be incurred at whatever sacrifice,—in short whether the change that they so lightly advocate would have as its result a great and appreciable increase in the peace and contentment of His Majesty's subjects generally

3 The questions to which the Government have to find a reply before they embark upon any new policy involving large expenditure in this matter are few and simple. They may be summarised as follows —

(*i*) What are the evils of the present system? Are they tending to increase or diminish in the ordinary course of administrative development?

(*ii*) If there are such evils would they disappear under the proposed syttem? and, if they would, would the result of their disappearance be marked by an appreciable advantage to the community at large?

(*iii*) Would the measures proposed bring with them any other evils in their train equal to or greater than those experienced under the existing system?

Having answered these questions it remains with the Government to decide on which side the net gain lies, and whether the net gain (if any) on the side of the separation is so great as to warrant the very heavy expenditure which is involved

In this note I proceed to examine these questions one by one and to record my conclusions with the grounds and facts on which they are based These conclusions are founded on an experience of only one Province but on an experience of twenty-seven years gained at very close quarters with the people who benefit or suffer, as the case may be, from the system under which they live.

The evils of the present system Are they disappearing, continuing, diminishing or increasing?

4 There is no doubt that, crudely stated, the case for a change is based on the assumption that under the present system an overzealous or hasty District Magistrate or, even, in a few cases, a District Magistrate actuated by personal animus, launches a prosecution against some unoffending man, and that the subordinate magistrate is so complacent and timid that, against his better judgment, he convicts the offender rather than incur the displeasure of his superior The chances of an ill-judged prosecution, whether at the instance of a District Magistrate, the Police, or much more often the private complainant, will go on until the millennium, but the complacent magistrate who convicts to please his superior has gone, and those who assert the contrary are guilty of calumniating not merely the honourable men who as District Magistrates are doing their best to maintain law and order and administer justice, but also to a greater degree the Indian Magistracy on whom falls the great bulk of the criminal work of the country, since the one is admittedly as a general rule well intentioned but mistaken, while the other, if the charge were true, deliberately does what he knows to be wrong There was a time in these Provinces when the Deputy Commissioner was the complete master of his district for all work—executive, revenue, criminal and civil—and his immediate appellate court was the Commissioner, who was also Sessions Judge, while even the Judicial Commissioner at the top of all was drawn from the executive ranks. Those days have gone never to return Whether the net amount of justice or injustice dispensed in those days was greater than it is now cannot be confidently asserted, but the old system necessarily gave more scope to personal bias and unjudicial heat than that now prevailing In these days the District Magistrate seldom tries a case himself if he can avoid it, it has often been found necessary to relieve him partially even of the work of trying appeals from 2nd and 3rd class Magistrates. In these days the 1st class Magistrate is far more concerned with the view taken by his appellate court, the

Sessions Judge, than by the pleasure or displeasure of the District Magistrate In these days District Magistrates show the most scrupulous regard for the independence of the courts of their subordinate magistrates. In fact this fear of being reversed in appeal is so great that it not infrequently causes magistrates to hesitate and discharge a man of whose guilt they feel virtually certain This change in the attitude of the Courts of Magistrates has gone on steadily and continually before my own eyes, and I indignantly repel any accusation of pressure to convict by District Magistrates A few magistrates may consult the District Magistrate on a question of law or even on the question of sentence which is a question more of general knowledge and experience than strict judicial training ; but on the question of guilt or innocence they exercise their own free judgment In fact the picture of the vindictive District Magistrate and his complacent magistracy is now a complete anachronism. The Hon'ble Sir Harvey Adamson in his speech, which is quoted in the reference, very properly dismissed the occurrence of rare scandals such as those raked up by the memorialists from consideration As well cry out in England for the replacement of all J. P's by stipendiary magistrates, because some J P.'s show indiscretion or want of judgment But there is a far stronger argument *ad hominem* than this, and one which in India is nearer home In the early part of my service it was a commonplace that a considerable proportion of the Indian Magistracy was notoriously corrupt, and even to this day scarcely a year passes without some case of corruption or the strongest suspicion of corruption coming to light, yet how would the Indian politicians like the argument that Indian Magistrates and Judges could not be safely employed and must be replaced by Europeans? The truth is that the dishonest magistrate is becoming less and less common and should ultimately disappear. But he is not so rare, and has not disappeared so completely, as the bogey of the complacent Magistrate convicting to please his District Magistrate conjured up by the advocate of complete separation

5. But the advocates of separation, if they can be induced to give up the occurience of occasional scandals common to all fallible human systems as a ground for their demand for separation, fall back upon a more insidious argument They are prepared to allege that a Magistrate who fails to convict and is unpopular with the Police or the District Magistrate must despair of all promotion, and will be irretrievably ruined by the confidential reports against him This is at once a base and a baseless insinuation levelled against the high executive officers of Government. To begin with, after the confidential report is made by the District Magistrate, it is perused by the Sessions Judge who records his opinion and after it is seen and remarked upon by the Commissioner, it goes to the Judicial Commissioner who enters upon it his remarks with reference to the comments made by the other officers through whom it has passed. If the District Magistrate, or the Commissioner, were to make unfavourable remarks upon the cimnal work of a Magistrate, with which these High Judicial officers disagree, they would most certainly record their disagreement Is it conceivable that any head of a Government would pass over a Magistrate for promotion if the highest Judicial Authorities were reporting favourably upon him? An assertion of this kind is one which anyone can make but which the heads of Departments cannot publicly repel. I have perused hundreds of confidential reports, and I can remember none in which there was any material divergence of opinion between the Deputy Commissioner and Commissioner on the one side and the Sessions Judge and the Judicial Commissioner on the other as to the merits of a Magistrate Some of the best executive officers are as Magistrates rather weak in law and procedure, but it is rare to find a strong and sound Magistrate who is really a bad executive officer. On his integrity and zeal and the sum total of his qualities, does a man receive promotion, and the insinuation that a District Magistrate can ruin a man because he is not complacent is utterly false. With great respect I am unable to agree with the Hon'ble Sir Harvey Adamson in his remarks upon the subject in his speech already mentioned. The statement that a Magistrate's court "has not the air of cool impartiality about it which should pervade a court of justice," is a pure assumption based on that very theory of complacency which has no foundation in fact It is, I can only reaffirm, the criticism of the Sessions Judge, and not the good graces of the District Magistrate, to which the Magistrates mainly look for guidance If the Magistrates are afraid to acquit accused persons through fear of the District Magistrate, they have a very curious way of showing it, for I can recall many cases in which not only the District Magistrate but the Commissioner and the Local Administration were anxious on public grounds to secure a conviction but in which the Magistrates acquitted. The independence of the Magistracy in respect of their decision in each individual case is thoroughly understood by themselves, thoroughly appreciated by the people, and thoroughly established in the minds of all officers.

6. Nor am I able, with all deference, to follow Sir Harvey Adamson in his exposition of the greater necessity which prevails in Bengal than elsewhere for this change It is perfectly true that rough-and-ready methods are necessary in undeveloped countries, but it is just in these that non-judicial or prejudiced action is most prone to occur It is a necessary concomitant of this stage of civilization. But the law of the Penal Code and the Code of Criminal Procedure is not a rough and ready method it is a well ordered system of Criminal Law and Administration. Any misuse or abuse of the powers that these Codes give, any indulgence in personal bias, must of necessity be checked in places where lawyers abound strong public opinion is believed to exist, and there is a loud voiced press to make it heard. In fact drastic action is to be taken to remove alleged abuses in those very areas in which such abuses are both least possible and least likely to succeed.

7 So far, I have left out of the question the case of subordinate Magistrates of the 2nd and 3rd class These consist of Tahsildars, young Magistrates under training, and Bench and Honorary Magistrates The District Magistrate is their appellate court and to this extent it may be said that these minor courts look to him for his approval when they decide their cases There is no special objection to District Magistrates being relieved of this appellate work, but it would be absurd to incur special expense for this purpose if such relief is not otherwise necessary A vast majority of the cases tried by these Magistrates are petty cases in which neither the District Magistrate nor the police take any interest, and it is ludicrous in the extreme to suppose that the District Magistrate is personally biased in respect of them Some one has got to control these courts and point out their defects, and as long as that some one is an intelligent man with a reasonable experience of magisterial work, it is of little consequence whether he is the District Magistrate, or a specially empowered 1st class Magistrate, who exercises that control Time after time Deputy Commissioners and Commissioners ask that some Sub-Divisional Magistrate or other senior Magistrate be empowered to relieve the District Magistrate of this necessary but tedious work, but on almost every occasion it is the Judicial Commissioner who objects to it on the ground that the officer suggested has not sufficient experience, or cannot be relied upon to control subordinate courts

8 The separation of judicial and executive functions in the sense of the removal of improper influence over the conduct of criminal trials has already been effected silently and surely by natural administrative development The evils attaching to the present system, as it existed in undeveloped countries, have passed away with the conditions that gave rise to them, and the agitation as now conducted is a mere revival of old memories In the natural course of events the Collector or the Deputy Commissioner will recede further and further from the actual trial of criminal cases, and the country does not stand in need of any artificial hastening of that recession even if it did not entail heavy expenditure My answer to the first question is that the dangers which once existed of too subservient a magistracy have disappeared

The second question to be answered is whether any evils that may have attached or may attach to the present system would disappear if the system proposed were adopted, and whether any appreciable benefit would accrue to the people at large ?

9 I have already demonstrated to the best of my ability that all such evils are a thing of the past, but if it be granted that they still exist it is equally certain that they would not disappear under the proposed system And here I come to the most extraordinary fallacy that has persistently obscured the real question at issue It is always assumed that the hardship alleged to result to individuals from the present system is the undue readiness shown by Magistrates who are lacking in independence to convict But the real truth is that the hardships (if they are felt at all) are due not to the conviction of a man but to his prosecution Prosecutions under any system of procedure will take place upon the initiative of a private prosecutor, the Police, or the District Magistrate, even if the last mentioned authority is dissociated from the trial of cases or the control of the Magistracy, he cannot be deprived of the power of setting the law in motion Now is it conceivable that a prosecution instituted by the Police or by their Head could be summarily dismissed by any special magistracy appointed ? The whole process of prosecution, the suspense of mind, the expense of money spent in defence, the damage to reputation, or loss of liberty while under trial, would remain absolutely unaffected by the suggested changes

When there is any doubt about a conviction the law already allows the grant of bail and complete powers of appeal and revision to or by the higher Judicial officers In fact the liability to suffer from a prosecution that fails remains just as great and just as little as under the present system The liability to unmerited hardships suffered by the public through improper or ill-considered prosecution is not very serious, but if it were greater than it is, it would not be reduced by the appointment of separate Magistrates Only a certain percentage of cases are reversed in appeal, and the percentage of those reversed, in which the accused is released without a strain upon his character, is very small, and again of these few cases the proportion in which the prosecution is declared to have been *ab initio* unjustifiable is still smaller, so that the proposed change in the law might (but would not certainly) affect only these are cases in which the case for a prosecution was so extraordinarily bad that it would be summarily thrown out without any process of investigation

Such utterly baseless cases as these have no greater chances of success under the present system, so that the evil which it is sought to remove, *i e*, the protection of innocent persons from a harassing trial, would not be touched at all Is it for this infinitesimal and indeed imaginary benefit that all the duplication and expense which the proposals contemplate are to be undertaken ?

10 Then, as to the argument about promotion depending upon the complacent Magistracy, the suggestion is totally false, but if it were true it would apply no less to special Magistrates than to the District Magistrates It is not proposed to make all Magistrates removable only by attainder in both Houses of Parliament Even in England the independence of the Magistracy is not carried to these lengths, and greater reliance is placed upon the Magistrates because they are honourable men and gentlemen than upon the authority that appoints them Such as the argument is it would still rest with the executive to make

or mar the special Magistracy, and if high executive officers of Government are to be guided by base motives, and not by justice, equity, and good conscience, we may as well retire from the task of governing India

11 I have endeavoured to show (and I hope succeeded in showing) that the whole cry about the jeopardy of peaceful subjects under the present system is utterly mistaken and shallow, and that the evils, real or imaginary, which are stated to attach to that system, would not be abated even to an infinitesimal degree by the changes contemplated Money spent on such a scheme would be money thrown away

The third question is whether the proposed system has not attached to it greater evils than that which it would replace

12 At first sight it may seem a small matter to set up a separate Magistracy Even if it is conceded, it may be urged, that the dangers and evils of the existing system are exaggerated or even imaginary, still the creation of a separate agency for criminal work would be desirable on the mere justification of division of labour, under which the Magistrates would not have their attention diverted from their work by other demands on their time This sounds very plausible and simple, but it goes much further than the tentative scheme to which the Secretary of State has given his approval And, with great respect, I feel bound to point out that this provisional scheme is not fully consistent with the aims of those politicians who call for complete separation The Secretary of State will not contemplate the duplication of Sub-divisional Magistrates, but in that decision lurks a great anomaly In other words, the executive taint which is said to mar the sense of fairness of District Magistrates is not considered likely to affect the judicial mind of the Sub-divisional Magistrates The higher officer is considered to be more liable to prejudice than the lower There could not be a greater misapprehension If the older and more discreet Magistrate cannot be trusted amidst all the publicity that surrounds him in the Head-quarters, can it be for a moment contended that possibly a young and impetuous Sub-divisional Officer would be less liable to hasty action or injudicious support of a designing Police in an out-of-the-way corner of the interior? The truth is that no responsible statesman can be brought to face the enormous cost and waste of employing two officers in the place of one for a benefit which is merely theoretical If, however, it can be shown that this form of separation is not only not required, not only harmless but actually fraught with the greatest danger (as I clearly foresee it will be) the greatest danger to the administration of the Criminal Law, the greatest danger to the well being of good Government in India,—then the case against such a change becomes overwhelming

13 The greatest asset in our peaceful administration of the country is not the prestige of the District Magistrate The whole question of prestige I flout and fling away as a pitiable justification of the present system. What is the prestige of the District Magistrate, or any official, if it is to be maintained only at the cost of injustice or harassment of quiet citizens? With the greatest respect to the many eminent men who have forced the question of prestige to the front in this venerable controversy, I repeat that it is entirely a fallacious and adventitious argument That the man who rules should also have the power to punish is one of the crudest and yet the most common forms of expressing the prestige argument I care not greatly if the District Magistrate never tries a case or hears an appeal from years end to years end That he should be there to try a case when passions are high, when racial or religious feelings are aroused, when rioting or looting is rampant is a valuable asset But it is not the most valuable asset The most valuable asset in the whole present system, the key to our administration of the law, is the peculiar position which the District Magistrate occupies I cannot, I fear, claim to be a student of the judicial systems of other countries, but I can claim and do claim to know what is the form of administration that is best and wisest in the unprecedented position which we occupy in India The District Magistrate as head of the Police is bound to see that the lawless are brought to justice, and as head of the Magistracy he is bound to see that the law-abiding are protected He is not merely the prosecutor, but he is the kindly defender of the poor, literally and truly the "Garib parwar" To him resort those who fear prosecution, to him resort those who fear private enmity, whether on the part of the Police or on the part of the Magistrates It is the District Magistrate by whom the innocent and the guilty alike desire to be tried His duty as protector of the weak steadies the exercise of his influence as head of the Police, and his duty as head of the Police prevents his yielding to weak sentimentality or ultra-technicality Reams have been written on the necessity of maintaining the head of the District [Deprive him of his dual capacity, take away his role as protector of the poor, and you convert him into a Chief of Police, you rob him not of half of his prestige (that indeed might be increased by the enhancement of his sterner aspect, *oderint dum metuant*), but you rob him of his influence for good the influence that the wields as Chief Magistrate, the duty he has of protecting the poor and oppressed against the oppressor, be it the Police or the private enemy Glance for a moment at the special powers which he alone holds (Schedule III, Part V of the Criminal Procedure Code) They are 20 in number He has the ordinary powers of a Sub-divisional Magistrate Is he likely to be less trustworthy than his Sub-divisional Magistrate? He may require letters and telegrams to be delivered to him Is he more or less likely to take a broad view of this than a man who is a Magistrate and nothing more? He has a number of preventive powers which it is not even sought to take away from him He

has the power to quash convictions, to cancel bonds for keeping the peace, and to compel restoration of abducted females To leave him his power to harass and take away his powers to protect would be of all errors the most grievous

14 I utterly refute, repel, deny, and repudiate the statement made by Sir Harvey Adamson that the people have a right to think that justice cannot be obtained in our Criminal courts It is the hard fate of the Police in this country that the prosecutor is regarded as a persecutor however just and well meaning It is the good fortune of the District Magistrate that he is also the protector It is the voice of the common people that hails him as such, it is the most convincing and striking testimony to his impartiality and fairness Let this or that politician prate and write of executive abuses, let the scheming seditionist, who has escaped from the courts by the skill of his lawyers, the intimidation of witnesses, and the bewilderment of the courts by mountains of exhibits, months of cross-examination and weeks of special pleading, fly to this refuge, the last resort of the guilty, the impugning of the good faith of the District Magistrate and of the confidence reposed in him by the toiling millions It is false and entirely false We know it to be false, we who have served laborious days and years among the people, we who in our early days as Magistrates were behind the scenes of many prosecutions, trials, and acquittals, we who have as Settlement Officers heard the people's comments on the police and magistracy, we who have heard the cry "*Zilla Saheb ki dohai*," we who have as Commissioners been able to take a detached view of the toil and moil of district life in the fertile plains and among the hills and jungles, I who have administered this Province for five years after a previous service of 22 years among the people and the country I have known and loved, we all know it to be false In the eyes of the people the District Magistrate is the man that rights the wrong I entreat the Government to take heed before they shatter that belief What they destroy they cannot restore It is the most precious heritage of our administrative system in India

15 Why have I allowed myself to depart from the atmosphere of calm reasoning to indulge in such vehemence ? It is because I feel that no warmth is misplaced when a member of the highest Council in the land, however sincere, however well intentioned, should publicly adopt, with however many reservations, a view which is a libel on our officers and a travesty of the cherished trust of the people in the honour and good faith of our District Magistrates

16 But the objections to the proposed system do not rest upon mere warmth of assertions made in the defence of the men upon whose impartiality a slur is cast Hitherto the District Magistrate's responsibility for controlling the Magistracy as well as the Police has prevented him from becoming a partizan of either Under the proposed arrangements the Chief Magistrate must tend to become a champion of the independence of the Magistracy, and the District Magistrate a champion of the Police In my official career I know numerous cases of Magistrates whom the Police have regarded as hostile to them The District Superintendent of Police has laid his grievances against such men before the District Magistrate, but before the District Magistrate has adopted their view he has examined the record, heard what the Magistrate concerned has said and exercised his calming influence upon one or other or both as may seem to have been required He has kept an even balance But under the proposed cleavage the District Magistrate would be deprived of the power even to call for records while any attempt made by him to talk over a Magistrate's method of conducting his cases with the Chief Magistrate would be resented as executive interference with judicial independence It is certain that friction must be the result, it is unavoidable The removal of the moderating influence of the District Magistrate, who is now the arbiter for both the Police and the Magistracy must affect the District Magistrate's point of view and tend to increase the friction that sometimes occurs between the Police and Magistracy but which is now allayed by the calming influence of the District Magistrate Could anything be more unfortunate than this ? Nothing is so injurious, or so disastrous in its results on the successful administration of the criminal law, as a supposed antagonism between the Police and the Courts Such feelings would have arisen in very many cases in the course of my service but for the influence of the District Magistrates I do not for a moment contend that every Chief Magistrate would be devoid of judgment or be so narrow that he could not appreciate illjudged distrust of the Police by a Magistrate subordinate to him, but whenever he thought it right to refuse admonition his refusal to intervene with moderating advice to his subordinate Magistrates would no longer command the full confidence of the Police as would a similar refusal by a District Magistrate under the present system The special Magistrate may by force of training and experience be able to apply a more judicial mind to each case before him, but it would be too much to expect from him the width of view of the present District Magistrate, when his very appointment has been ostentatiously created to free him from all suspicion of executive bias

17 Moreover, inasmuch as the subordinate Magistracy would in their executive capacity be subordinate to District Magistrates, friction must be largely engendered These subordinate Magistrates would be endeavouring to serve two Masters one would complain of neglect of magisterial work, the other of neglect of executive and revenue work One would be played off against the other The whole basis of the arrangement is utterly impracticable and any one who has any real aquaintance with things as they are in this country and knows how practice differs from theory cannot fail utterly to condemn such a system It is only a few years ago in these very Provinces that civil judicial functions were exercised by executive officers What was the result? Constant friction and inefficient work all-round The conscientious and hard working were crushed by their desire to please both masters, and to

distribute their attention fairly; the lazy ones profited by this opportunity to plead heavy civil work for neglecting revenue work and heavy revenue work for neglecting civil The executive authorities wish to keep *A* in district *X* and *B* in district *Y*, and the judicial to move *A* to *Y* and *B* to *X*, with reference to the amount of civil work

18 The only possible alternative to the present system is complete separation one set of officers doing criminal work under the Judicial authorities, and another set doing revenue and executive work under the Executive authorities No one even proposes to do this and no one would listen to such a proposal Theoretically it would be perfection practically it is impossible, until the Civil Service has taken its departure from India, and Local Self-Government has taken its place Two watertight compartments, no Magistrate with any experience of the people other than those who enter the Courts, no executive and revenue officers with any magisterial training Two officers one belonging to each compartment at each sub-division and tahsil Friendship between them carrying the taint of improper executive influence, coolness or hostility between them, bringing in its train intrigue and the break-down of efficiency If only well intentioned persons who write or discourse about the beauties and ideals of the complete separation would regard India as it is, and not as the Utopia they would have it be, before they commit themselves to such fantastic arguments! Do they not know that in every Indian town, parties and factions are rife, and that it is the delight of these to set brother against brother, parents against children and children against parents? How much more to set one officer against the other would be their constant aim Frequently does one have to move a Tahsildar or Munsiff or other officer because he has taken sides in petty local factions The cost of such a scheme would be appalling and its failure complete and inevitable, yet it is the only logical outcome of the cry for separation of the judicial and executive in this country But if the Finance Member could produce the money, if the whole of these objections were non-existent, the scheme would still fail for want of men

19 The popularity of the Indian Civil Service as a career is already waning, the dislike to the sedentary and monotonous life of a purely judicial service is intensifying, and if it were necessary to add 50 per cent to the strength of the Civil Service to make separation complete all down the line or even the 20 to 25 per cent required to man each district with a separate Chief Magistrate, the men required would certainly not be forthcoming, unless the whole standard of the service were lowered The proposal is one that cannot be contemplated Upon the maintenance of this standard depends for long years to come the success of our administration in India

20 It will doubtless be urged by some that the additional officers, however numerous, could easily be procured from the ranks of educated Indians The persons who urge this are the same persons who would be ready to officer a complete Province with Indians from bottom to top, and if one Province, why not all Provinces? We have moved and are moving in this direction, but from the first tentative step of infancy they would pass on to a furious gallop without regard to the precipices in front There are to be found Indians in high position who in quality, ability and character, are the equal of the Englishmen of similar status and the number of these will gradually increase, but it would be untrue to say that among Indians who hold responsible positions, ordinarily reserved for Europeans, all are adequately equipped with the qualifications required from the incumbents of these posts Several of them were appointed indulgently and are treated indulgently some showed great promise once but have proved disappointing To multiply the number of responsible posts held by Indians is to increase the percentage of inefficiency and to court disaster The time has not come when the whole Magistracy can be filled by Indians

21 If then a complete duplication of the administration by the creation of a separate magistracy is impossible and fraught with such evil consequences, is there advantge to be gained by the first step which the Government of India have proposed to take in Bengal? It is a compromise which combines some of the faults of both systems and yet lacks the merits of either It does not meet that cry for separation which it is designed to meet and yet confesses the defects on which that cry is based It attempts to remove the evils of the system in the very place above all where they have the least chance of showing themselves It has the supreme demerit of further dissociating the District Magistrate from his character as a protector of the weak in the very Province of all where he has in his executive capacity the least chance of showing the ryots that he is their friend It removes the moderating influence in disputes between the Police and the Magistracy in the very province where that influence is most required, where the spirit of antagonism between the Police and the Magistracy is likely to be most diligently fostered, and the isolation of the Magistracy in a narrow judicial compartment removed, I will not say from executive interference, but from executive experience is likely to be most complete

22 I respectfully urge that this plan should not be introduced either in Bengal or anywhere else If the duties of the Collector are so heavy and onerous that he needs more help, let a senior Magistrate in such districts be appointed as additional District Magistrate to relieve him of the work of appeals and revision and other miscellaneous criminal duties, but let not his status be altered and let him not be deprived of his powers of control, his powers of righting wrongs, his dual responsibility towards the Police on one side and the Magistracy on the other, and his dual character as maintainer of the peace and protector of the weak

Above all I would urge most earnestly upon the Government of India to recede from the position taken up by their former Home Member, the Hon ble Sir Harvey Adamson, that until

this so-called reform is granted the public have the right to feel that they will not receive justice from the criminal courts of the land. Possibly his experience of Burma in the making may have brought the Hon'ble Sir Harvey Adamson into contract with cases of indiscreet executive heat where there should have been judicial calm If there have been such cases they will disappear in Burma with the march of time as they have disappeared elsewhere Are the new Chief Magistrates to be exempt from human frailty and human fallibility? Will they be any more competent to detect the falsity of concocted cases than the man who has lived and moved among the people? They may be more competent in law, but will they be greater experts in order, will they be better judges of human nature? The whole cry is artificial, the cry of men who repeat a catchword without thinking out its practical application, and the vast majority of whom have not the knowledge to think it out even if they would

23. It might perhaps be contended by some that the objections to a complete separation of the entire Magistracy are overstated, and that if they were so serious as has been described, similar objections would apply to the existing judicial service of Districts and Sessions Judges, or Divisional Judges as they are called in some Provinces Undoubtedly the judicial service leaves something to be desired, most of its European members have not had sufficient experience of civil work, and most of its Indian members have not had sufficient experience of criminal work Those judges who have had most executive experience in the early part of their service are generally the best criminal judges, and those judges whose training has been almost confined to civil work are generally the best civil lawyers

The improvement of the judicial service is another and a separate question which cannot, however, be solved by narrowing the experience of men who embark upon the judicial career. But whether legally well-equipped or not, the grade of judge is necessarily above and outside the every day relation with the people that fall to the lot of a Magistrate The judge does not deal with facts at first hand · the cases that he tries are a few out of the many that come before the criminal courts, the work of investigation has been completed and has passed the test of magisterial enquiry The position and status of the judge, and the part he plays differ entirely from that of the Magistrate who is and must continue to be the custodian of the peace The country has outgrown the time when the Commissioner could also be the Sessions Judge A judicial expert is required for the office of Judge; but the separation of the Commissioner from judicial functions is on an entirely different plan from the separation of the duties of the District Magistrate and the Chief Magistrate. The effective combination of the two powers of Judge and Commissioner in one man is no longer practicable, the Commissioner should be ubiquitous within his Division, the Judge has to be almost stationary, the duties of each are such as to occupy the full time of one man, and the combination is therefore impossible

24. To sum up in a few lines the conclusions of this Note Drastic and costly remedies may be necessary when the disease is increasing, they are out of place when the patient is practically convalescent and the sickness from which he suffered has disappeared This is the case with the evils alleged to arise from the combination of magisterial and executive powers in the same office Whatever evils may have once lurked in such a combination they have vanished before the growing independency of the Magistracy and the brighter light of public opinion in which the work is conducted

The Government of India have themselves noticed the risks incurred by the narrowing tendencies of purely judicial work in the civil courts Their willingness to face similar risks but fraught with much graver consequences in the case of the magistracy could only be justified by the most incontrovertible proof that the evils of the existing system of controlling the magistracy were fast becoming intolerable. That these evils have now been eliminated, while those arising from separation are certain and grave it has been the object of this Note to show By whom is the change called for? Not by the voice of the people who come to our courts for justice, not by the men who have served their lives among them, but by the same men who pass resolutions for making land revenue settlements permanent throughout the land, for instituting universal trial by jury, for the repeal of the Arms Act, in short, for the introduction into this oriental country of occidental institutions which may or may not have been successful in the west but which it is certain cannot be applied successfully in the east There is nothing to show that the cry for complete separation of judicial and executive functions has any more solid or practical basis upon which to rest than the cry for all these other measures to which no statesman, with a due sense of responsibility for the well-being of India, could accede

R. H CRADDOCK,

Chief Commissioner,
Central Provinces.

NAGPUR:
The 23rd January 1912

(Confidential)

Commentary on the Note by the Hon'ble Sir REGINALD CRADDOCK, *KCSI, ICS, Chief Commissioner of the Central Provinces, on the separation of Judicial and Executive functions*

I have been invited to make this Commentary by Sir Reginald Craddock himself I have read the Note with the deepest interest and attention It deals with a subject to which I have given a good deal of independent consideration for many years, and I am able to say that, except in one or two details, I find my own matured and definite opinion on the subject to be in accord with the Note

2 In this Commentary the best way seems to be to first set out my points of dissent from Sir Reginald Craddock, and then to give reasons for my substantial concurrence with his protest against the separation of judicial and executive functions in the way now being considered by the Government of India

3 I may mention that my experience is confined to three Provinces and was gained at different times I have lived and worked among the people of the Punjab, the United Provinces and the Central Provinces practically all my life I practised as a Barrister for 16 years before I became a judge in 1897, and during that time, being helped by a useful knowledge of the vernacular tongue, I was in the closest touch with natives of all classes, and in possession of their confidence in most matters, including such political views and aspirations as are generally concealed from the officers of Government In the Central Provinces I have had special opportunities of watching, as it were from both sides of the fence, the working of the system against which the cry for reform has now been raised It is possibly due to this unique experience that I have been invited to write the present Commentary At any rate it seems necessary to offer these personal explanations as an excuse for my venture

4 I am unable, with all due respect for the author, to endorse all that is written in paragraphs 4 and 5 of the Note The present system has no doubt moved with the times and the assertions made in paragraph 8 of the Note are substantially correct. The autocrat of the District, drawn from the Indian Army, with his open domination, on lines of military discipline, over the procedure and judgments of a subordinate magistracy, mostly recruited from the *amlah*, has gone with the improvement of the latter, with the growing need for decentralization, and with the development of subordinate initiative along right lines But the oriental mind does not readily believe that the control of the guiding hand has weakened because the reins have become less visible It is against the lines of oriental thought and reasoning that he who has power over others should not exercise it, and the absence of those outward and visible signs, by which the Deputy Commissioner of the past made patent his guidance of magisterial decisions along the right course, is not accepted by natives, generally as any guarantee that such guidance has been withdrawn It is discounted as a mere political precaution No doubt this is for the most part an unjust impression, but it is not wholly unfounded I regret I cannot endorse the view that "the complacent Magistrate who convicts to please his superiors has gone" He was a very common feature when I desisted from practice at the Bar in 1897, and, though far less common now, he is still with us The Deputy Commissioner who works on him extra-judicially beyond proper limits is also not wholly extinct Since I have been a Judge I have had more than one confidential complaint from a native Magistrate that his independence of judgment was expressly fettered by his Deputy Commissioner, and only a few days ago I read a confidential report by a District Magistrate condemning "friction with the police" on the part of a Magistrate who is capable and just and inclined to follow his own independent judgment in police cases

5 Then there is a large number of native Magistrates who still believe, however unjustly that their careers depend upon the confidential reports made concerning them by the executive officers of Government The remarks concerning these reports made in paragraph 5 of Sir Reginald Craddock's note are no doubt substantially correct but, rightly or wrongly, an impression prevails that the opinions of the judicial officers in such matters carry little weight when opposed to those of executive officers, in whose hands lies practically all power of promotion, and from whose ranks the Head of the Administration is invariably drawn

6 It is not, in my opinion, correct to say that every complacent Magistrate "does what he knows to be wrong" when he decides a case in the way he thinks will best satisfy the executive authority immediately over him On the contrary, in nearly every case, he does what he believes to be right, because he seldom has any doubt of the *bonâ fides* of that superior, and he merely subordinates his own opinion, without any real attempt to form it, to what he believes to be an opinion not likely to be wrong, and which, if wrong, imposes no moral responsibility upon him for the consequences of error

7 It seems to me that paragraphs 14 and 15 of the Note indicate some misunderstanding of what was said by Sir Harvey Adamson in his speech in the Imperial Legislative Council on the 27th March 1908 I have carefully read that speech, as published in the *Gazette of India*, and I am unable to find in it any definite charge to the effect that "the people have a right to think that justice cannot be obtained in our Criminal Courts" The speaker seems to have stated a hypothetical case as representing a stage of political evolution, but I do not interpret him to have asserted that such a condition had been actually reached in India generally It seems to me that he intended to suggest that it was imminent in Bengal But even so I think his speech indicates a loss of touch with the real public opinion of India,—that his official eyes had been blinded by the dust thrown in them by seditionaries and his official ears deafened by the clamour of extremists The belief of the natives of India in the

good faith, not only of the European District Magistrate, but of the European Officer generally, is a self-acquisition of our past administration that has certainly not deteriorated in the provinces with which I am acquainted, and cannot, I believe, have been lost even in disordered Bengal If such a charge, as Sir Reginald Craddock so vehemently repudiates in his note, had been made by the Home Member in the Legislative Council, it would have been an utterance as inaccurate and unjust, as ill-advised and short-sighted, as impolitic and dangerous as was ever made in our Legislative Factory But it was not made and, I think, not intended to be made

8 My remaining note of dissent is concerned with paragraph 23 of the Note No one, whose opinion on the subject is worth having, would draw any analogy between Civil and Criminal jurisdiction in relation to their emancipation from executive control The peace and order of a District are not, as a rule, directly dependent upon the civil rights and obligations of individuals, *inter se*, nor is any administrative policy of the executive usually involved in the destinies of civil suits The joinder of civil, criminal, and executive functions in one person was only justifiable, even on financial grounds, while one officer could give equal attention to all When that time went by, and civil jurisdiction and justice received only such scant study and belated attention as could be spared from criminal and executive work, then the joinder became a misjoinder and a scandal If this paragraph of the Note is intended to suggest that anything but advantage and progress have ensued from the creation of an independent civil judiciary, I beg to express my respectful dissent from that suggestion Both as a practising Barrister and a Judge I can vouch for the facts that an enormous improvement, and the elimination of an administrative defect that was fast becoming a scandal have resulted from the severance of civil from other jurisdictions in the subordinate Courts of the Central Provinces and Berar No doubt the judicial service, as remarked by Sir Reginald Craddock, "leaves something to be desired", but in this it marches side by side with the executive-*cum*-magisterial service which has had a much longer education Both are in an early stage of evolution at present However, it is not necessary to pursue this point further It is not germane to the matter in hand, if I am correct in the view that the results of a transference of civil jurisdiction furnish no argument by analogy for or against the extraction of criminal jurisdiction from executive hands It they did, I should be on the side of the separator

9 Subject to the above remarks, I have no hesitation in expressing my concurrence with the admirably reasoned Note of Sir Reginald Craddock, and I will endeavour, in setting out my own statement of the case, to avoid a mere echo of what is already to be found in that Note, though of course many of the grounds put forward by the Chief Commissioner have been my own in arriving at a conclusion, and it is not possible to avoid them altogether

10 I endorse the remarks contained in the two first paragraphs of the Note The cry for separation is not of the millions who are dumb, who have got to know and trust, and therefore to like, the present system, and who are nothing if not conservative It comes from the noisy few who, with a parrot-like education in western languages and science, have also learned the discordant notes of radicalism and socialism, and who therefore scream for reform Their loud-voiced utterances are helped on by a fraction of Anglo-Indian malcontents, who act as their megaphone and secure them hearing from a liberal-minded but ill-informed Parliament which believes itself to be listening to "the voice of India"

11 The questions postulated by Sir Reginald Craddock in paragraph 3 of his Note correctly set out the issues before the Government of India I would put them even more briefly, namely

(*a*) Is reform necessary?
(*b*) If so, does the method suggested hold out reasonable certainty of reform?

As the result of my own experience and independent judgment in the matter, my answer to both the above questions is in the negative I cannot of course write with any first-hand experience of Bengal But Sir Harvey Adamson in his said speech evidently intended to draw a picture of what he believed to be the condition of that province It is noteworthy that he was constrained to admit that 90 per cent of the people wanted no change from, or at any rate had no complaint against, the present system I am not able to comprehend the argument that change was nevertheless necessary because lawyers might induce persons with guilty consciences to be dissatisfied with a form of administration under which they could not escape justice Is an expensive and untried system to replace one tried and not found wanting at the instance, or for the benefit, of the man who "fears that the police have a spite against him, or that the District Magistrate as guardian of the peace of the District has an interest adverse to him?" Is the District Magistrate of the present day to be declared unfit to administer criminal justice in his Court because suspicion of his impartiality may arise from that fear of the police which fills the breast of the town *badmash*, or from that apprehension of conviction which holds in check the known land rioter, or habitual burglar? And does it follow that this kind of suspicion—if it has any real existence as a suspicion of the Magistrate's *impartiality* —will communicate itself to "all who have business with the Courts" as claimed by Sir Harvey Adamson? With great respect, I answer these questions unhesitatingly in the negative It is a false basis upon which Sir Harvey Adamson built up his case for separation As a foundation for that fabric it is a veritable quicksand If the case is so weak in Bengal, admittedly it has much less force elsewhere in India Therefore I feel justified in dealing with it as a general proposition for the whole country

12 What is the policy which we are trying to work out in this country? What is the end in view? Is it the himer establishment, or the gradual relinquishment, of British rule over India? One or other of these practical results is the goal towards which every consistent measure and reform must be directed An India under an autonomous administration, on the lines of that existing in Australia or South Africa—a system under which European and Indian work together on equal terms in patriotic brotherhood and unanimous loyalty to the British Throne—is a Utopia which sensible men will do well to leave to the Congress visionary and his ill-informed English friend It is beyond the range of practical politics It will never be any nearer realization than it is at the present day For the purposes of this Commentary I assume that eventual relinquishment of British rule in India is not a policy which the present Government of India wish to pursue or encourage, and that they will firmly resist all efforts towards that end which any English political faction may ill-advisedly seek to introduce That being so, and the District Magistrate being the contact point of British rule with the masses of the Indian people, any weakening of that contact in the way proposed would obviously tend to break the circuit by which the principles of criminal justice on British lines now reach and educate the people New currents, hostile to those principles, will be set up, and chaos and failure must ensue

13 But it will be asked why an equally efficient contact cannot be made by way of the Chief Magistrate who is to replace him *qua* his judicial functions My answer is that it cannot be so because the Chief Magistrate will have purely judicial authority, and, for that very reason, will be non-conductive of the influence which a duly empowered District Magistrate now exercises over the subordinate magistrates on the one hand and the people on the other Those who have thought deeply on the subject will readily admit that the administration of criminal justice everywhere must have some local *preventive* control, apart from the *corrective* control of Courts of appeal and revision What is the authority exercising such preventive control in England? It is a strong public opinion, possessed of a voice that must be heard, having an honest abhorrence of crime because it is crime, watchful that every person accused of crime shall have a fair trial, and persistent that, if guilty, he shall not go unpunished This public opinion, is the main safeguard of criminal justice in England, and it is the result of centuries of civilized education and development In its operation on the administration of that justice by the Courts it is an executive control of the highest order Its principles and demands are ever present to the mind of the Magistrate who has to decide on the guilt or innocence of an accused His judgments and the measure of his sentences are all influenced by it The Magistrate himself, drawn as he is from the people holding such views, is imbued with the same principles And the respect given to him—the public confidence in his *bonâ fides* whichever way he may decide,—is of material assistance in making him careful and impartial That is why criminal appeal on the merits of a decision is unknown in England

14 Can it be said that such a public opinion has an existence in India at the present time? Ask those who have an experience of juries in educated and civilized Bengal Ask those who are daily "assisted" by assessors in dispensing criminal justice in less advanced tracts Everybody who has any experience of this country knows that the worst forms of crime are regarded with apathy by the general body of the Indian people Evanescent feelings of horror and resentment may be produced among those brought into immediate contact with such offences as cruel murder or barbarous child-rape but they seldom survive after the arrival of the investigating police Co-operation in securing detection, and determination to secure punishment, born of an honest and permanent public opinion, are not to be found Sympathy with the offender, even to the extent of active assistance towards his escape from justice, is the rule when any interest of a public nature is displayed, and it is based upon the accepted maxim that punishing the criminal cannot undo his crime In consequence of this there is always a very real difficulty in obtaining evidence against a guilty person

15 Can a public opinion of this kind be relied upon for the preventive control which must govern every Court of criminal justice? Can it be entrusted with authority to enforce those principles of equity, justice, and good conscience which constitute the bed-rock of the criminal justice for which we have made ourselves responsible in this country? The answer to these questions must obviously be in the negative, and the result is that we are driven to find an artificial substitute for what is missing At present we have the European District Magistrate as the best available representative of what, according to our ethics, should be, but certainly is not yet, the public opinion against crime His knowledge of its principles is hereditary and trained, his honesty of purpose is well established by past experience, and his exercise of control, readily conformable to all diversity of local conditions, becomes daily more discreet He is the unit of British rule in immediate contact with the ruled Those who represent the District Magistrate as one who either is, or is believed to be, vindictive and unscrupulous, or as one who is a mere "statistic-hunter," draw a wilfully false picture The *bonâ fides* of the District Magistrate is accepted by all, not excepting the habitual criminal of the city slums, and those who affect denial of it are wirepullers who seek to make political capital thereby, in furtherance of disloyal schemes or radical phantasmagoria Until native public opinion, still in leading strings, inclined to be unruly, and at present unfortunately encouraged by mistaken leniency to follow hereditary tendencies along a path widely divergent from English public opinion, has been taught to hold the right course unaided, to regard crime as the European District Magistrate now regards it, and has developed a voice which speaks strong and true on the side of just and necessary punishment of it, any transference of executive control over the subordinate magistracy, from the present holder of it to the people, will

be on the lines of handing over the management of a most difficult business to a very minor ward from his guardian

16 It is absurd to speak of the executive control of purely judicial Courts of appeal and revision Such institutions have about as much disciplinary control, at least in this country, as is exercised in a school by an examiner or a lecturer who is not also a schoolmaster therein It is this disciplinary control which you want in India, over Magistrates necessarily chosen from among a people whose attitude, as a community, towards crime and its punishment, is as I have stated and no purely judicial superior, with his maxims against the fettering of free judgment and premature interference with discretionary procedure, can be expected to exercise such discipline by the *prevention*, as distinguished from the *correction*, of error and injustice The Chief Magistrate who is to be vested with the judicial powers of the District Magistrate will have nothing more than corrective authority In effect, each Magistrate will then either be subject to a dual control, or, if completely emancipated, to no executive control save that of public opinion, and other even less desirable influences

17 Let it not be supposed that the removal of the District Magistrate's influence, real and imaginary, would bring about our conception of independence of judgment in the average native Magistrate, even of the present day Other influences, less honest than those which now govern the District Magistrate's control would immediately come into play other guides to judgment with far less knowledge of the truth and anxiety for justice would establish themselves Judicial decision, reached by judicial reasoning on the merits of evidence given in Court, is still an exotic in the oriental mind Decision on extra-judicial grounds, generally honest but not infrequently dishonest, is still the rule A native Magistrate, whose integrity I know to be above suspicion, once told me, quite honestly and seriously, that Europeans are handicapped by having to decide on the adulterated matter laid before them in Court as evidence while he as one of the people, had means, and always made a point, of ascertaining the *aslee hál* (pure facts) by extra-judicial inquiry Even after bribery has disappeared—if it ever does—other extra-judicial influences will continue to govern judicial decisions by native Magistrates, and, in the system proposed, his only real executive control would come from the public opinion which I have depicted above Then crime and the criminal would flourish until the distant day when the Ethiopian shall have changed his skin and East will have become West

18 Parliamentary interference with the Government of India becomes greater and stronger every year, and in the present state of English public opinion, added to the waning interest in the Civil Service of India which is mentioned in paragraph 10 of Sir Reginald Craddock's note, it is tolerably certain that the majority of the Chief Magistrates, foreshadowed in Sir Harvey Adamson's suggestions as the judicial heads of Districts on the Criminal side, will be natives of India drawn from the ranks of Provincial Services, practically free to follow local public opinion and their own hereditary tendencies in dealing with crime Can any real friend of India entertain the faintest hope that such a state of things will further the prevention and punishment of crime according to British ideals? Will the future District Magistrate, stripped of all power except that of a prosecutor, maintain his present interest in the administration of criminal justice? Will the police sustain their energy in investigation when persons they know to be guilty escape time after time from the hands of a judiciary who feel no direct responsibility for the prevention of crime, and who will be free to decide upon pure technicalities, and in accordance with a popular demand for acquittal in all but absolutely conclusive cases of proved guilt? Will the High Courts be able to cope with the appeals against acquittals with which they will then be flooded? These are questions that should be answered before the proposed change is made

19 It is my honest conviction, after eliminating, to the best of my ability, all racial prejudices and illusions

(1) that the general body of the people in India are not yet dissatisfied with the present system of criminal administration upon the ground that executive and judicial functions are held by a single European officer, and that they do not want a change, though the ranks annually increase of radicals and socialists who cry out against it, as they do against everything that is the creation of the British Government, and

(2) that the separation proposed will inevitably undermine British supremacy, and wrest the scales of justice from the only hands capable of holding them even amid the heterogeneity of this land

The fusion of races in India is still out of sight, and, until it happens, India cannot exist as a geographical and political entity save under the rule of one tribe more powerful than all the others Where the greatest power is combined with the highest available standards of justice, toleration, and liberality, so much the better for the country but the whole history of mankind makes it clear that physical power must remain the ruling element while diverse races and creeds are to recognize a common government The dreams of *swadeshi*, of autonomy after the style of Canada, of an "India governed by Indians," and the like, are mere delusions, when they are anything more than empty phrases on the tongues, or unimagined forms in the minds, of the would-be patriotic visionaries who represent the extremist policy of the present day

20 In conclusion, therefore, I would say, let the District Magistrate remain as he is Let him actively watch over and control the work of his subordinate magistracy, as well as that of the District Police Let him bear no responsibility for the mere statistical results of police work, or be in any sense a mere prosecutor and partisan Let him guide and direct the procedure, and advise the judgments, of his less experienced Magistrates, not on the merits of particular cases, but along general principles of magisterial policy, and thus shut out noxious extra-judicial influences from other sources Let his presence and known opinions exercise the same pressure towards honesty and righteous judgment which public opinion places upon the Magistrate in England Relieve him of all criminal appellate work Let errors of procedure and judgment by Magistrates in particular cases be *corrected* by Courts of appeal and revision Let there be less of that executive centralization above the District Magistrate which has gone further than anything to lower his status and dignity—to convert him, in popular parlance, from the *Burra Sahib* to the *Zillah Sahib* Let it be clear that the Commissioner mainly controls his revenue work, while the higher Criminal Courts are open for appeal from, and revision of, his own original magisterial work, as well as that of his subordinate magistracy, but of his executive and preventive action maintain him as the virtual final authority Let subordinate magistrates learn that their best model for imitation, in principle and practice—in independence and honesty of judgment—is the District Magistrate Given such conditions, and the Government of India can sit content with folded hands, while extremists howl in India, and malcontents babble in England, about the evils of a joinder of executive and judicial functions in the District Magistrate But let it also be a rule that District Magistrates shall be senior men, who, naturally and by training and experience, are fit to maintain the responsibility, and command the respect, without which neither they, nor the system which they represent, can hope to succeed The practice of placing youths of a few years' standing in charge of Districts may be very beneficial to recruitment for, and contentment within, the ranks of the Indian Civil Service, but it has furnished much handle for those who seek to pull down the present system The future District Magistrate must serve a long apprenticeship as a Sub-Divisional Magistrate learning criminal law and procedure, the strength and weakness of rules of evidence, and the languages and habits of the people and in that capacity all concerned must get to know and trust him as honest in purpose and straight in judgment—one before whom no police machinations can succeed against the innocent, and no falsehood and corruption can save the guilty Such a reputation, coupled with the necessary experience, should be taken to demand at least ten years for acquisition, and there should be no District Magistrate of less than that term of service The whole system depends, for maintenance of popular support, on the personality of the District Magistrate, and therefore his appointment must always be one for special consideration and treatment I do not know what effect this would have on the prospects of the Indian Civil Service, but it will certainly be less damaging, even on that score, than the changes which are inevitable if we continue to furnish ground for criticism of a kind once made by a shrewd native gentlemen who said to me "all the *Burra Sahibs* in these days are *Chota Sahibs*" His remark referred to a particular time in the Central Provinces when several Districts were temporarily held by junior Assistant Commissioners

21 Finally—and this is most important—let the District Magistrate himself maintain and see that his subordinate magistrates and police officers cultivate, a discreet and deferential attitude towards judicial decisions even when they happen to be disappointing to the executive Every umpire in a game sometimes falls into error, or fails to satisfy both parties But, save in the most exceptional and flagrant cases, in which a consensus of public opinion promptly rises up against him, it is considered bad form to question his decision or murmur against it, even in private while his *bonâ fides* is always kept above suspicion or suspicious disparagement Let the same healthy principle govern executive attitude towards judicial procedure and decision and in this let the District Magistrate lead the way Let him accord to Magistrates and Judges the same credit for honesty of purpose which he expects for himself, and be careful to prevent and punish dereliction from that course among his subordinates He will find his position enormously strengthened Rightly or wrongly the people regard the High Courts in India as the champions of their liberty, and, in proportion, the more or less independent Courts of Session are similarly esteemed The present lamentable friction between the judicial and executive branches of Government being only too well known to the peoples, is it at all surprising that there should be a continuous increase in the ranks of those who learn to regard the executive authorities first as mere prosecutors and then as persecutors? I do not urge counsels of perfection That equanimity under adverse judicial decision, born of an attitude which can respect the judge while it condemns his decision—a frame of mind and habit of thought which accepts and explains judicial mistake as honest error—is natural to the English mind It has been perverted in India by the exercise of more authority than discretion, among a people prone to attribute ulterior, and generally improper, motives to all judgments which are adverse to them, or which they know to be wrong, especially where such judgments come from a source to which they owe no direct obedience and subordination In this one respect the District Magistrate has failed, and still fails to reproduce an important characteristic of that English public opinion which I have attempted to describe Let this serious defect of executive procedure be eradicated, and the flood now rising against executive authority as a whole—for that is what can be seen in this campaign against the District Magistrate—will subside It is time that all concerned should appreciate the facts that persistent hostility on the part of executive officers towards the judicial forces is a foolish

and suicidal course, and that it is largely responsible for such agitation as has taken place towards the severance of executive and judicial functions What executive can hope to maintain public confidence that does not accept with respect the decisions of the law courts with which it is supposed to be in co-operation? Much could be written on this evil, but enough has been said to make it clear that executive *prestige* depends upon a proper regard for judicial *prestige*, and I firmly believe that when this matter has been put right, and is known by the public to have been corrected, we shall hear much less than we now do anent the separation of executive and judicial functions of the District Magistrate

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12th February 1912.

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